NO. 780

KILDARE LUMBER COMPANY,
APPELLANT,

VS.

NATIONAL BANK OF COMMERCE, OF KANSAS CITY, MO., ET AL,
APPELLEES.

RECORD.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, AT NEW ORLEANS, LA

Appeal From United States Circuit Court, Eastern District of Texas, at Jefferson.

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Be it Remembered:

That on the 2nd day of October, A. D. 1894, in the Circuit Court of the United States in and for the Eastern District of Texas, at Jefferson, on the Chancery side of said Court in the case of The National Bank of Commerce, of Kansas City, Mo., vs. The Kildare Lumber Company, et. al., the following proceedings were had, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES

Within and for the Eastern District of the State of Texas.

THE NATIONAL BANK OF COMMERCE, OF KANSAS CITY, MO.

VS.

KILDARE LUMBER COMPANY. W. R. CAMP, GEORGE T. TODD, THE ATLANTA BANK OF ATLANTA, TEXAS, CITIZENS BANK, OF JEFFERSON, TEXAS; J. H. BEMIS, W. B. WARD AND LOUIS S. SCHLUTER.

IN EQUITY.

To the Honorable Judges of the Circuit Court of the United States, in and for the Eastern District of the State of Texas:

The National Bank of Commerce, of Kansas City, Mo., a corporation, organized under and pursuant to the National Banking laws of the United States, and having its principal place of business and being a citizen and resident of Kansas City in the State of Missouri, brings this its bill of complaint against the Kildare Lumber Company, a corporation, organized under and pursuant to the laws of the State of Texas, and having its principal office and being a citizen and resident of the City of Jefferson in the State of Texas; W. R. Camp, a citizen and resident of the City of

San Antonio and State of Texas; George T. Todd, a citizen and resident of the City of Jefferson and State of Texas; the Atlanta Bank, a corporation, organized under and pursuant to the laws of the State of Texas, having its principal office and being a resident and citizen of the town of Atlanta in the said State of Texas; The Citizens Bank of Jefferson, a corporation, organized under and pursuant to the laws of the State of Texas and having its principal office and being a resident and citizen of the said City of Jefferson and State of Texas; James H. Bemis, a resident and citizen of the said City of Jefferson and State of Texas; W. B. Ward, a resident and citizen of the City of Jefferson and State of Texas; and Louis S. Schluter, a resident and citizen of the City of Jefferson and State of Texas.

And thereupon your orator complains and says: that heretofore to-wit; on the 13th day of July, 1892, the said Kildare Lumber Company made, executed and delivered to W. B. Ward its certain promissory note whereby it promised for value received, to pay to the said W. B. Ward on or before the 13th day of October, 1892, the sum of $4.555.39, together with interest thereon from the date of said note at the rate of six per cent. per annum; also its certain other promissory note whereby it promised for value received to pay to said W. B. Ward on or before the 13th day of October, 1892, the sum of $4,555.39 with interest thereon from date at the rate of six per cent. per annum; also its certain other promissory note, whereby it promised for value received to pay to said W. B. Ward on or before the 19th day of October, 1892, the sum of $4.555.39 with interest thereon from date at the rate of six per cent. per annum; and also its certain other promissory note whereby it promised to pay to said W. B. Ward on or before the 22nd day of October, 1892, $4,555.39, with interest thereon from date at the rate of six per cent. per annum; also one

other certain promissory note, whereby it promised to pay to said W. B. Ward on or before the 16th day of January, 1893, the sum of $6073.85, with interest thereon from date at the rate of six per cent. per annum; also its certain other certain promissory note whereby it promised to pay to said W. B. Ward on or before the 19th day of January, 1893, the sum of $6073.96 with interest thereon from date at the rate of six per cent. per annum; also its certain other promissory note whereby it promised to pay to said W. B. Ward the sum of $6073.96 on or before the 22nd day of January 1893, with interest thereon at the rate of six per cent. per annum; also its certain other promissory note whereby it promised to pay to said W. B. Ward three months after the date of said note the sum of $750, with interest thereon from date at the rate of six per cent per annum; also one other certain promissory note whereby it promised to pay to said W. B. Ward four months after date thereof the sum of $2500, with interest thereon from date at the rate of six per cent. per annum.

That on the 13th day of July 1892, the said Kildare Lumber Company also made, executed and delivered to one John M. Bemis, its certain promissory note, whereby it promised to pay to said Bemis three months after the date of said note the sum of $1250, with interest thereon from date at the rate of six per cent. per annum; and also one other certain promissory note, whereby it promised to pay to said Bemis, four months after the date thereof, the sum of $2,000, with interest thereon from date at the rate of six per cent. per annum.

That on the said 13th day of July 1892, the said Kildare Lumber Company, executed and delivered to one Elijah Robinson, its certain promissory note, whereby it promised to pay to said Robinson, or order, six months after date of said note, the sum of $10,049.59, with interest thereon from date at the rate of

six per cent. per annum; and also one other certain promissory note, whereby it promised to pay to said Robinson, or order, twelve months after the date of said note, the sum of $10,049.59, together with interest thereon from date at the rate of six per cent. per annum; also one other certain promissory note, whereby it promised to pay to said Robinson, or order, eighteen months after the date of said note the sum of $10.049.60, with interest thereon from date at the rate of six per cent. per annum.

That on the said 13th day of July 1892, the said Kildare Lumber Company made, executed and delivered to one W. B. Chew, its certain promissory note, whereby it promised to pay to said Chew thirty days after the date of said note the sum of $3250, with interest after maturity of said note at the rate of eight per cent. per annum.

That on the said 13th day of July 1892, the said Kildare Lumber Company, made, executed and delivered to the said Louis S. Scluter, its certain deed of trust, whereby it conveyed to said Schluter the legal title to the following described property, of which the said Kildare Lumber Company was then the owner, to-wit: At Kildare, 1 locomotive, 24 logging cars, one box car, one passenger coach, one hand car, two push cars, twelve (12) miles of railroad, known as the Kildare and Linden Railroad, together with Stations at Kildare and Linden; section houses, sidings and everything used in connection with said railroad; also the extention of said road made by H. A. O'Neal, Receiver of said Jefferson Lumber Company. Also planing mills at Kildare and all fixtures and everything used in connection therewith. Also two saw mills, and all fixtures, known as the Kildare and Number Two mills, and also miscellaneous property, all of which said property above mentioned is fully described in Exhibit A attached to O'Neal and Allday's report of sale filed in the above cause June 21st 1892, which

is now referred to and made a part of this deed.

Also the following described property at Atlanta, Cass County, Texas, to-wit: One saw mill and fixtures, also planer and two locomotives, and logging cars, blacksmith shop, loots, etc., and about twelve miles of railroad known as the Atlanta and Mt. Pleasant Railroad, together with sidings, etc., and everything used in connection with said road. Also miscellaneous property. A full description of the property above mentioned will be found in Exhibit "B," attached to H. A. O'Neal & E. A. Allday's report of sale filed by them in the above cause June 21, 1892, which said exhibit is now referred to and made a part of this deed.

Also trial balance of accounts of the Jefferson Lumber Company, due on the 21st day of July, 1891, showing bills of two hundred and thirteen thousand six hundred and 13-100 dollars, which were deposited by J. H. Bemis, President of the Jefferson Lumber Company, prior to July 1st, 1891, with various and divers persons as collateral to secure debt of said Company, and all of which items will fully appear in the exhibit attached to said report and marked "J" which exhibit is now referred to and made a part of this deed.

Also the following described real estate, situate in Cass County, Texas, To-wit:

104 3-4	acres of land	Wm. F. Young survey.
420	"	B. B. B. & C. R. & Co. "
1535	"	Curtis Jamison "
521	"	Benj. Hawkins "
916 8-10	"	" "
341	"	" "
521	"	" "
225	"	John Lick "
450	"	Henry Warnell "
881	"	Lewis Casterman "
397	"	John Davis "
75	"	John McKerley "
200	"	Robt. Maxwell "

400	"	Rcbt. Maxwell	"
800	"	"	"
200	"	"	"
100	"	James Jackson	"
190	"	Evan Watson	"
540	"	W. F. Young	"
300	"	Hornett Brown	"
1660 1-20	"	M. D. Frazier	"
553 1-3	"	"	"
88	"	Andrew Hampton	"
380	"	"	"
427	"	"	"
97	"	"	"
329 3-4	"	"	"
1476	"	James Brown	"
557	"	John Borkman	"

For a more perfect description of the thirty-one tracts above mentioned, a reference is here made to a deed from the Jefferson Lumber Company to Erastus Jones, dated July 1st, 1891, which said deed is recorded in the office of the county clerk of Cass County, Texas. Deed Register 2 pages 333 to 388 inclusively. Also the following tracts of land situated in Cass County, Texas:

1600	acres	James Clark survey.	
1405	"	"	"
160	"	"	"
1312	"	William Donahoe	"
932	"	"	"
320	"	R. C. Graham	"
480	"	L. H. Walker	"
57 1-2	"	L. S. Walker	"
200	"	Evan Watson	"
100	"	John Nall	"
175	"	John Davis	"
460 1-2	"	Henry Warnell	"
55	"	T. J. Foster	"
397	"	John Davis, H. R.	"

For a more particular description of the last named

fourteen (14) tracts of land, a reference is hereby made to a deed from the Jefferson Lumber Company to W. B. Ward, dated July 3rd, 1891, which said deed is duly recorded in the County Clerk's Office, Cass County, Texas, in deed Register 2, pages 228 – 331 inclusively.

Also the following described tracts of land situated in Cass County, Texas. Abstract 131.

140	Acres	B. B. B. & C. R. Ry. Co.	Survey.
1545	"	Geo. S. Young, H. R.	"
114	"	John Hall	"
320	"	Richard Barrington	"
934	"	S. Denman	"
79	"	B. B. B. & C. R. Ry. Co.	"
160	"	M. D. Frazier, H. R.	"
800	"	James Clark	"
186 2-3	"	Wm. Smith	"
320	"	B. B. B. & C. R. Ry. Co.	"
320	"	B. F. Witaker	"
175	"	P. M. Keaton	"
160	"	E. T. Jackson	"
125	"	J. M. Givens	"
320	"	Jessie Walling	"

' Block No. 34 in the town of Kildare.

540	Acres	Joseph Jones	Survey.
1 12-100	"	Jane Richie	"
9	"	Jane Richie	"
334 1-3	"	Fisher & Miller	"

Right of way purchased from M. A. Birmingham & Everett or a portion of P. M. Keaton survey.

208	Acres	William Donahoe	Survey
160	"	R. Brett	"

For a more perfect description of said last named tracts (23) of land, a reference is hereby made to a deed of trust from the Jefferson Lumber Company to W. R. Camp, trustee, dated July 7th, 1891, and recorded in County Clerk's Office, Cass County, Texas,

in record book of mortgages, 197 to 215 inclusive.

Also 834 acres of land situated in Cass County, Texas, being a portion of the Henry Buckler, being same land deeded by J. H. Bemis to H. D. R. Bemis July 7th, 1891, said deed is recorded in County Clerk's Office, Cass County, Texas, in deed record 2, pages 326; also 74 1-2 acres A. Emanual H. R. survey deeded by John Allison to Whitaker & Galloway March 4th, 1885, which said deed is recorded in County Clerk's Office, Cass County, Texas, in deed record G, page 207 which said deed is now referred to and made a part hereof.

Also 85 acres of land, a portion I. M. Watson survey, being same land deeded by D. H. Zachry to the Jefferson Lumber Company, April 11th, 1887, which said deed is recorded in book J. page 12 in County Clerk's Office, Cass County, Texas.

Also 283 1-3 acres a portion of the John McKerley survey deeded from D. D. Dodd to the Jefferson Lumber Company, July 9th, 1891, which said deed is recorded in County Clerk's Office, Cass County, Texas, Record Book M, page 442, the last four named surveys are located in Cass County, Texas.

Also pine timber upon the following named surveys in Cass County, Texas: 160 acres, Wm. Hutton deeded from J. O. Lockett to the Jefferson Lumber Company, September 26th 1890, said deed is recorded in the County Clerk's Office, Cass County, Texas, in Book 2, page 57,

Also 900 acres, R. C. Graham survey, deed by J. T. Latham to the Jefferson Lumber Company, deed not of Record.

Also 239 acres, E. Frazier, P. Price and O. F. Holcomb surveys, deeded by J. W. Smith to the Jefferson Lumber Company, November 21st, 1889, which said deed is recorded in County Clerk's Office of Cass County, Texas, in deed, record O, page 468.

Also 202 acres, W. B. Wilson and J. M. Boren survey

deeded from J. L. Stone to the Jefferson Lumber Company, May 1888; said deed recorded in County Clerk's Office in deed Record L. page 393. Also the right of way over the following described lands: 308 acres, of the John Lick survey, deeded by J. A. Duncan and wife to the Jefferson Lumber Company, March 4th, 1890, the deed is recorded in the County Clerk's Office, Cass County, Texas, in deed Record N pages 177. 320 acres John Lick deeded from Geo. B. Thaggard to the Jefferson Lumber Company, April 2nd, 1890, recorded in Clerk's Office, Cass County Texas, in deed record M. page 271.

Also 600 acres, Wm. Donohoe survey, deeded from W. Cornclius, et al., to the Jefferson Lumber Company, May 23rd, 1890, recorded in deed record book P, page 538; all of said tracts of land situated in Cass county Texas, about 8 miles west of Atlanta.

Also pine timber on the following described tracts of land situated in Cass county Texas:

320	Acres	T. J. Foster,	Head-right Survey.
160	"	N. J. Wilton,	pre-emption "
212	"	Dixon Dyer,	H. R. "
160	"	C. Lemmons,	H. R. "
100	"	K. A. Wilborn	"
100	"	William Wilson	"
72	"	M. D. Frazier	"
900	"	A. D. Duncan	"
174	"	R. C. Graham	"
80	"	K. A. Welborn	"
50	"	Dixon Dyer	"
140	"	J. R. Boice	"
275	"	A. Taylor & H. O. Jones	"
200	"	" "	"
553½	"	K. A. Welborn	"
98	"	"	"
78½	"	A. D. Duncan	"
100	"	John Lock	"

The last obove described 18 tracts of land are fully

described in a certain deed of trust from the Jefferson Lumber Company to W. R. Camp, trustee, dated July 7th, 1891, recorded in County Clerk's Office, Cass county, Texas, in book D, of mortgages, pages 199 to 125 inclusive, which deed is now referred to for a more perfect description of said lands upon which said timber stands.

Also 440 acres of land situated in Harrison county, Texas, a portion of the Head-Right survey of 440 acres of land, a reference is hereby made to a deed from C. C. Gallowy, W. L. Whitaker and Benj. Whitaker to the Jefferson Lumber Company, dated July 8th, 1885, which said deed is recorded in County Clerk's office in Harrison county, Texas, in deed register 22, page 105. Also fractional block 35 in the town of Kildare, Cass county, Texas. Also ten acres situated in Marion county, Texas, a portion of the Greenleaf Perry H. R. Survey. For a more perfect description of which, a reference is hereby made to a deed in the County Clerk's office in Marion county, Texas, in Deed Register, Vol. 2. pages 438-439.

Also 798 acres of land located in Marion county, Texas, being the Dan O. Driscol bounty warrant survey and patented to K. A. Johnson, assignee of said Driscol, January 30th, 1893, No. patent, 404, Vol. 14, for a more perfect description of said land, a reference is hereby made to said patent.

Also 100 acres of land situated in Marion county, Texas, a portion of the Greenleaf Perry, H. R. survey; for a more perfect description, see deed from Whitaker & Galloway to the Jefferson Lumber Company comprising all the property formerly owned by the Jefferson Lumber Company and sold to W. B. Ward, W. B. Chew, Jno M. Bemis and Elijah Robinson by O'Neal and Allday commissioners, except the lumber and stock of merchandise.

That said described property was conveyed to said Schluter in trust to secure the payment of indebt-

edness of the said Kildare Lumber Company to said Ward, Bemis, Robinson and Chew above mentioned; that by the terms of said conveyance it was provided that in the event of the failure of the said Kildare Lumber Company to pay said above mentioned notes or any of them at the maturity thereof, the said Schluter as trustee as aforesaid should have the right and be authorized to sell the property in said deed of trust described at public vendue at the court house door in the City of Jefferson, county of Marion and State of Texas, first giving notice of the time, terms and place of sale by hand bills posted in public places; and should apply the proceeds of the property sold to the payment of the said indebtedness by said deed of trust secured, as aforesaid.

But your orator further shows to your honors that in the preparation and execution of said deed whereby said above described property was conveyed to said Schluter as trustee as aforesaid, the provisions of the statutes of Texas requiring sales of real estate under deed of trust to be made in the county where such real estate is situated, and it was provided that real estate should be sold in Marion County, and that inasmuch as nearly all of the real estate so conveyed to said Schluter as hereinbefore stated, is situated in the county of Cass and State of Texas, said Schluter has no power or authority under the laws of the State of Texas and provisions of said deed of trust to make a sale of said real estate for the payment of the indebtedness thereby secured; and that your orator is without relief except in a court of Chancery.

Your orator further respectfully states to your honors that subsequent to the execution of said above mentioned notes to said Elijah Robinson, the said Robinson endorsed and transferred said notes to your orator, and your orator is now the legal holder and owner of the same; that on the 13th day of July, 1892, there was paid and duly credited on each of said

notes the sum of $263.73; and that the balance of said notes and the interest thereon remains unpaid, although two of said notes have long since been due and payment thereof has been often demanded of said Kildare Lumber Company.

Your orator further states that soon after the incorporation of said Kildare Lumber Company, to-wit: On the —— day of July, 1892, the said Company issued to one Church J. White, who is the cashier of your orator, a certificate of stock in said company to the amount of about $37,000, and also issued to Elijah Robinson, who was then attorney for your orator, stock to the amount of $1,000; that although said certificates of stock were issued to and in the name of said White and said Robinson the same in point of fact belonged to and are the property of your orator, the consideration therefor having been paid by your orator, and the said stock being issued to said White and said Robinson simply as a matter of convenience in handling the same, which facts were at the time of the issuing of said stock and still are well known and understood by the said Kildare Lumber Company and its officers and managers.

Your orator further states that it is informed and believes and charges the fact to be that the notes of said John M. Bemis and W. B. Chew, hereinbefore mentioned, have been fully paid off and discharged; and that a portion of the indebtedness to W. B. Ward hereinbefore mentioned as being secured by said conveyance to said Schluter, has been paid off and discharged.

Your orator further says that it is informed and believes and charges the fact to be that soon after the organization of said Kildare Lumber Company there was issued to said W. B. Ward stock to the amount of over $50,000, and that the balance of the capital stock of said corporation, other than that issued to said White and Robieson and amounting to over $150,-

000, is under the control and management of said James H. Bemis; that said W. B. Ward is now and has been since the organization of said Kildare Lumber Company, the President thereof, and said Bemis is now, and has been, since the organization of said Company, the manager thereof.

That said Kildare Lumber Company, soon after the date of its organization, acquired a large amount of property, other than that hereinbefore mentioned as having been conveyed to said Schluter, as trustee as aforesaid, consisting of several million feet of manufactured lumber, a stock of general merchandise, and divers and sundry notes and accounts, an exact description of which cannot be given, but exact information in regard to which is in the possession of said Bemis, and possibly also of said Ward.

That a majority of the Directors of said Kildare Lumber Company, do not, in any way participate in the management of its affairs, but having elected said Bemis as general manager of said corporation, submit to him the sole control and management of its affairs, and take no account whatever of it condition, or whether its property is being properly managed and cared for, or on the other hand, being mismanaged and wasted; that those of the Directors who make any effort to control and direct the management of the affairs of said corporation, are because of being in a minority powerless to do so; and that said corporation and its property and affairs are managed and controlled by said Bemis without any consultation, advice or direction from any of the Directors or stock-holders, except said Ward.

That although required by laws of said corporation to give a bond in the sum of $10,000, conditioned for the faithful performance of his duties as manager as aforesaid, and although required to make and file with the Secretary of said Corporation, monthly reports as to the conduct of its affairs and the condition of its business, said Bemis has persistently declined and refused

to execute bond as required, and neglected and failed to make any report whatever.

Your Orator further states that it is informed, and believes and charges the fact to be that the affairs of said Kildare Lumber Company are being by said Bemis mismanaged, and the assets of said Company are being by him wasted and squandered, if not actually and intentionally misappropriated; that your Orator, although entitled to full information as to the management and condition of the affairs of said corporation, and although having made strenuous efforts to ascertain the condition of the same, has been unable to obtain from said Bemis or said Ward, such information. Your Orator further states to the Court that because of the fact hat said Ward and Bemis, who are acting in concert, so far as said Kildare Lumber Company is concerned, control a large majority of the stock of said corporation, it is unable to have the affairs of said Corporation properly managed by the present Board of Directors thereof, or to procure the election of a Board of Directors who would properly manage its affairs; and that unless a Receiver be appointed by this Court to take charge of the assets of said Corporation, and properly manage the same, the interest of your Orator as a stockholder in said Corporation will be wholly sacrificed, and it will be in great danger of losing its said debt against said Corporation.

Your Orator further respectfully represents to the Court that it is informed, and believes, and charges the fact to be, that on the 7th day of July, 1891, the Jefferson Lumber Company a corporation then existing under the laws of the State of Texas, acting through James H. Bemis as its President, made, executed and delivered to said W. R. Camp, its two certain deeds of trust, whereby it conveyed to said Camp the railroad and equipments, mills and machinery connected therewith, and a very large proportion of the real estate hereinabove described as now belonging to the said

Kildare Lumber Company, and as being covered by the deed of trust to said Schluter as hereinbefore stated; that said deeds from said Jefferson Lumber Company to said Camp purport to be made for the purpose of securing a large amount of indebtedness due from said Jefferson Lumber Company to divers and sundry persons and corporations, among whom were the said Atlanta Bank, of Atlanta, Texas, and the said Citizens Bank, of Jefferson, Texas; that said Jefferson Lumber Company was at the time of the execution of said deeds of trust to said Camp, largely in debt and wholly insolvent, and that the execution of said deeds of trust to said camp were in violation of law and in excess of any authority conferred on said Bemis as president of said corporation, and made for the purpose of cheating and defrauding creditors of said corporation; that subsequent to the execution of said deeds of trust by said Jefferson Lumber Company, to-wit: on the ..... day of ..... 1891, an action was begun in the District Court within and for the County of ..... and State of Texas, by the National Bank of Galveston, and others, against the said Jefferson Lumber Company, and said court having acquired jurisdiction of the parties and the subject matter, afterwards, to-wit: and the ..... day of ....., 1891, made and caused to be entered of record, an order appointing one H. A. O'Neil receiver of the property and effects of said Jefferson Lumber Company, including all of the property which was conveyed by said deeds of trust executed by said J. H. Bemis, as president of said Jefferson Lumber Company, to W. R. Camp, trustee, as hereinbefore stated, and authorized and directed said O'Neil, as such receiver, to take possession and control of said property: that subsequently, to-wit: on the ..... day of ..... 18..... the said District Court in which said cause was pending, made and caused to be entered of record an order directing

the sale of all of the property and assets of said Jefferson Lumber Company, including the property covered by the aforesaid deeds of trust, executed by said Bemis as president of said company, and for the purpose of making said sale appointed said O'Neal and one E. A. Allday commissioners; that afterwards, to wit: on the day of 1892. all of the property and assets of the said Jefferson Lumber Company aforesaid were sold and conveyed by said commissioners to said W. B. Ward, Elijah Robinson, John M. Bemis and W. B. Chew, and by them, afterwards to-wit; on the .....day of July, 1892, sold and conveyed to the said Kildare Lumber Company, and the said Kildare Lumber Company thereby became possessed of a good and legal title thereto.

Your orator further respectfully states that it is informed and believes and charges the fact to be that upon the refusal of W. R. Camp, the trustee named in said deeds of trust made by said Bemis as President of said Jefferson Lumber Company, to execute the power undertaken to be conferred upon him, the District Court of the County of Marion and State of Texas, assuming to have jurisdiction in the premises, made and caused to be entered of record an order appointing the said George T. Todd, substitute trustee in lieu of the said W. R. Camp, and undertaking to authorize and direct him to make a sale of the property in said deeds of trust; that said Todd assuming to act under the said order of the said District Court of Marion County, Texas, has advertised for sale a very large proportion of the property belonging to said Kildare Lumber Company, including land situated in Cass County, Texas, and the railroads and equipments and mills and machinery hereinbefore described, and is threatening and is about to sell the same under the terms and provisions of the said deeds of trust, so as aforesaid made by said Bemis as the President of the Jefferson Lumber Company to said W. R. Camp.

Your Orator further states to your Honors that it is informed, and believes, that said deeds of trust under which said Todd has advertised said property for sale, were fradulent and void, and that said order appointing said Todd trustee, was made without lawful authority, and that a sale by said Todd, under said deeds of trust and said order would not convey a legal title to said property; but that not only would a sale and conveyance by said Todd cast a cloud on the title to said property, but the same is involved in so much doubt and uncertainty that said property would be sold at a sacrifice, and not result in any benefit to any one, and that such sale ought not to be permitted without there first being had an adjudication of the validity of said pretended deeds of trust, the order of said Court appointing said Todd trustee, and the rights of all the parties concerned.

For as much as your Orator can have no adequate relief except in this Court, and to the end therefore that the Defendants may, if they can, show why your Orator should not have the relief herein prayed for, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer, make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And your Orator prays that it may have judgment against said Kildare Lumber Company for the amount of said notes hereinabove described, executed by said Kildare Lumber Company to your Orator together with interest thereon; that the amount, if anything, due on said notes executed by said Kildare Lumber Company to said W. B. Ward, be ascertained; that the said deeds of trust executed by said James H. Bemis, as President of the Jefferson Lumber Company, to said W. R. Camp, trustee as aforesaid and under which said George T. Todd is now threatening and about to

make sale of the property therein described, be set aside, annulled and for naught held; that the equity of redemption of said Kildare Lumber Company in to the said property conveyed by it to said Schluter in trust as hereinabove stated, be foreclosed and said property sold for the payment of the amount due on the indebtedness by said deed of trust secured; that the said George T. Todd, and the said Atlanta Bank may be perpetually enjoined from selling, and causing to be sold, the property described in said deeds of trust from said Jefferson Lumber Company to said Camp, herein above described, or any part thereof.

And your Orator further prays your Honors to appoint a Receiver to take charge of, manage, control and otherwise, as your Honors may direct, dispose of the property of said Kildare Lumber Company, and to make such orders in regard to the duties of said Receiver, and the discharge thereof, as to your Honors may seem just and proper.

And your Orator further prays that a provisional or preliminary injunction be at once issued restraining said George T. Todd and the said Atlanta Bank, during the pendency of this suit, from selling, or attempting to sell, said property under said deeds of trust executed by said Jefferson Lumber Company to said Camp as aforesaid; and for such other and further relief as the equity of the case may require, and to your Honors may seem meet.

May it please your Honors to grant unto your Orator, not only a writ of injunction conforming to the prayer of this bill, but also writ of subpœna of the United States of America, directed to the said Kildare Lumber Company, W. R. Camp, George T. Todd, The Atlanta Bank, The Citizens Bank of Jefferson, Texas, J. H. Bemis, W. B. Ward and Louis S. Schluter, commanding them, on a certain day, to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as

shall seem proper and required by the principles of equity and good conscience.

ELIJAH ROBINSON.
Solicitor for Complainant and of Counsel.

STATE OF MISSOURI, } ss.
County of Jackson, }

Be it remembered that on the 24th day of August, 1893, before me, a Notary Public, within and for the County of Jackson and State of Missouri, personally appeared *H. C. Switzgeble*, Assistant Cashier of the National Bank of Commerce of Kansas City, Mo., the Complainant above named, who being by me duly sworn, deposeth and says: That he is the Assistant Cashier of the National Bank of Commerce of Kansas City, Missouri, and familiar with its business, and that he has read the foregoing bill of complaint and knows contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those he believes it to be true.

H. C. SWITZGEBLE.

Subscribed and sworn before me the day and year last above written. My commission will expire July 9th, 1896.

HENRY N. COOK.
Notary Public for Jackson County, Mo.

Endorsed U. S. Chy. No. 38, National Bank of Commerce of Kansas City. Missouri, vs. Kildare Lumber Company, et al.

BILL.

Filed August 26th, 1893, C. Dart, Clerk, by W. E. Singleton, Deputy.

IN THE CIRCUIT COURT OF THE UNITED STATES,
within and for the Eastern District of
the State of Texas.

The National Bank of Commerce,
of Kansas City, Missouri,
vs.
Kildare Lumber Company, et al.
} In Equity.

AMENDMENT TO PLAINTIFF'S ORIGINAL BILL.

Now comes said plaintiff and by leave of court files herein its amendment to its original bill in this cause and says that by the terms of the deed of trust executed by the Kildare Lumber Company, on the 13th of July 1892, to L. S. Schluter to secure the payment of the indebtedness to said plaintiff and others as set forth in plaintiff's original bill herein, it was stipulated and agreed that in case of default of the said Kildare Lumber Company to meet and pay off and discharge the indebtedness by said deed of trust secured or any part thereof at maturity of same, together with interest thereon accrued then and in that event the said L. S. Schluter, trustee named in said deed of trust, was authorized and empowered and it was his duty, immediately, on the request of the said parties holding the above described indebtedness by said deed of trust secured or any part thereof to enter upon and take possession of all the property by said deed of trust conveyed, and to proceed to sell the same to the highest bidder for cash to satisfy the unpaid demands secured by said deed of trust.

That after default in the payment of two of the notes in said deed of trust described as having been executed to said Robinson and by him assigned and transferred to the said National Bank of Commerce; the said National Bank of Commerce requested said Schluter to take possession of said property, but that said Schluter declined to do so, alleging that because of the defect in said deed of trust resulting from an oversight as in

the original bill herein stated the taking possession of said property would be of little benefit to the beneficiaries in said deed of trust, and moreover that he was satisfied that any attempt on his part to take possession of the property would be resisted by J. H. Bemis who was in posession thereof.

That said plaintiff further says that he is inforned and believes and charges the fact to be that said Kildare Lumber Company is in failing circumstances and practically insolvent, and that the property covered by said deed of trust in the present clouded condition of the title thereto would not sell for an amount sufficient to pay the balance due on the notes secured by said deed of trust. This information as to the financial condition of said company has come to this plaintiff since the filing of its original bill herein, although facts existed prior thereto.

And said plaintiff further says that before the filing of its original bill herein, it applied to both the secretary and president of said Kildare Lumber Company, both of whom were directors of said company and re-requested them to require the said J. H. Bemis as manager of said company to give bond as required by the by-laws of said company, and also make reports of the affairs and condition of said company as said by-laws as set forth in plaintiff's original bill herein, and was informed by both said Secretary and said President that they did not take any part in the management of the the business of said company, that they had accepted the positions they occupied as a mere matter of form and that the control of said company was in the hands of said Bemis; this plaintiff was also informed by T. J. Rogers another of the Directors of said company, that he had not and would not take any active part in the management and of the affairs of said company, and that he accepted the position of director as a mere matter of form.

Plaintiff therefore says that as a stock holder in

said company it could not, through the board of Directors, obtain any relief whatever for the wrongs in its original bill complained of; nor could it obtain such information as to enable it to make a specific demand for any particular action on part of said directors; and that moreover it was fully advised that any such demand would be entirely unavailable because of the fact that a majority of said part of directors declined and refused and would continue to decline and refuse to take any part of the management of the business and affairs of said corporation. This suit is not a collusion to confer jurisdiction in this case.

ELIJAH ROBINSON & J. H. CULBERSON,
Attorneys for Plaintiff.

Elijah Robinson, being duly sworn, on his oath, says the statement contained in the foregoing are true to the best of his knowledge and belief.

ELIJAH ROBINSON.

Endorsed, U. S. Chy. 38. The National bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et al.

AMENDED BILL.

Filed October 23rd, 1893.
C. DART, Clerk.
by W. E. SINGLETON, Deputy.

The National Bank of Commerce, of Kansas City, Missouri, Complainant, vs. The Kildare Lumber Co., et al., Defendants. } Equity No. 38.

AMENDMENT TO COMPLAINANTS BILL.

For amendment to its original bill filed in this cause, leave of court being first had to file the same, said complainant says that since the institution of this suit, to-wit: on the 13th day of January, 1894, the notes set forth and described in its said bill, to-wit: the note made, executed and delivered by the Kildare Lumber

Company to Elijah Robinson, dated July 13, 1892, whereby said Kildare Lumber Company promised to pay said Robinson, eighteen months after the date of said note, the sum of ten thousand and forty-nine and 60-100 dollars, and which note was endorsed by said Robinson and transferred to said complainant became due and payable, and that no part thereof, except as stated in said original bill has been paid.

Wherefore complainant prays judgment against the said Kildare Lumber Company for the amount on said note, with interest, as well as for the amounts of its other two notes in said original bill described and interest thereon; that the equity of redemption of said Kildare Lumber Company, in said bill described, be foreclosed and said property sold for the payment of all said complainants notes and interest, and whatever balance there may be due said Ward on his notes in said original bill mentioned and for general relief.

ELIJAH ROBINSON & J. H. CULBERSON,
Solicitors for said Complainants.
The National Bank of Commerce
of Kansas City, Missouri.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. the Kildare Lumber Company, et al.

AMENDMENT TO COMPLAINANTS BILL.

Filed January 23rd, 1894.

C. DART, Clerk,
By W. E. SINGLETON, Deputy.

In the Circuit Court of the United States within and for the Eastern District of Texas at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri,
vs.
Kildare Lumber Co., et al.

AMENDMENT TO BILL.

Now comes said complainant and, by leave of the

Court, files this its amendment to its original bill herein and says that the notes herein sued on and referred to in said original bill, were made payable to Elijah Robinson or bearer and not to Elijah Robinson or order as in said original bill stated.

J. H. Culberson and Elijah Robinson,
Solicitors for Complainant.

Endorsed U. S. Chy. No. 38. The National Bank of Commerce, of Kansis City, Mo., vs. the Kildare Lumber Company, et al.

AMENDMENT TO COMPLAINANTS ORIGINAL BILL.

Filed October 2nd, 1894.

C. Dart, Clerk,
By W. E. Singleton, Deputy.

In the United States Circuit Court, Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo., vs. Kildare Lumber Co., W. R. Camp, Geo. T. Todd, J. H. Bemis, W. B. Ward, L. S. Schluter, Citizens Bank and Atanta Bank.	Ch. 38.

The answer of T. J. Rogers, who has been allowed by order of this Court to appear and defend for the Citizens Bank, one of the defendants.

Comes now, T. J. Rogers, and says as follows: That he is the assignee of the Citizens Bank, one of the defendants in above cause, and he is as such assignee entitled to whatever rights said Citizens Bank has in the above cause and has been permitted by an order of this Court to appear in this cause and protect the rights of the Citizens Bank.

He says that on July 7, 1891, the Jefferson Lumber

Company was indebted to said Citizens Bank in the sum of $9,486.09 with interest ..... which have interest at the rate of ..... per cent. per annum from .....day of ..... . That on said July 7th, 1891, the said Jefferson Lumber Company executed to W. R. Camp a trust deed or mortgage in trust to secure the Citizens Bank in said sum of money conveying the property set out in complainant's bill as having been conveyed thereby, and said trust was also for the purpose of securing other debts due by the Jefferson Lumber Company as follows:

This defendant admits that the property mentioned in said trust deed to W. R. Camp was taken by H. A. O'Neal as receiver appointed by the District Court of Marion County in the cause of National Bank of Galveston vs. Jefferson Lumber Company.

This defendant is informed and believes that all and each of said debts have been paid except the debt due Citizens Bank and probably the debt due the Atlanta Bank.

This defendant admits that said property was sold under an order of said court by H. A. O'Neal and E. A. Allday, commissioners on May 3rd, 1892, and that W. B. Ward, W. B. Chew, and J. M. Bemis and Elijah Robinson became the purchasers and that sale was confirmed by the court. But he says that said property was sold and was purchased by the parties named and taken by them subject to whatever rights were created by or existing under said trust deed to W. R. Camp and subject to the rights of the Citizens Bank and this defendant under said trust deed.

This defendant admits that W. B. Ward, W. B. Chew, J. M. Bemis and Elijah Robinson and probably others organized the Kildare Lumber Company and issued to them stock of said Kildare Lumber Company and evidence of indebtedness as stated in complainants bill, that is sixty per cent. of their old debt against the Jefferson Lumber Company was to be in stock in Kildare Lumber Company and forty per cent. of the said

old debt in notes of the Kildare Lumber Company.

This defendant is informed and believes that W. B. Chew and James M. Bemis have been paid in full and that a portion of the amount due W. B. Ward has been paid but this defendant does not know how much is yet due W. B. Ward.

This defendant says he is informed by W. B. Ward, President of the Kildare Lumber Company and by J. H. Bemis, its general manager, that the Kildare Lumber Company has a defense to the debt set up by plaintiff; that it is to say they claim that the National Bank of Commerce, the complainant agreed as a part of the consideration of said debt sued on that it would return to J. H. Bemis or to the Kildare Lumber Company certain evidences of indebtedness against the Jefferson Lumber Company and J. H. Bemis to the amount of about $68,000.00, and that complainant ought not to maintain this suit unless and until they return said evidences of indebtedness.

This defendants admits that George T. Todd has been appointed trustee in place of W. R. Camp but he is informed and believes that before this suit was filed the matter had been so arranged as that the sale was not to take place, he is not advised and cannot state as to the legality of said Todd appointment.

This defendant is informed and believes that J. H. Bemis as general manager of the Kildare Lumber Company did not give any bond and did not make monthly reports to the president; as to the mismanagement and waste of said property by said Bemis this defendant has no knowledge, remembrance, information nor belief.

This defendant says the full amount of said debt due by the Jefferson Lumber Company is yet unpaid, and this defendant is informed and belives that the trust deed to W. R. Camp is a valid trust and a valid and subsisting lien to secure said debt due the Citizens Bank and a lien on said property prior and superior to

the lien created by the trust deed to L. S. Schluter set out in complainant's bill, and this defendant will file a cross bill praying a foreclosure of said lien.

This defendant further says that the Citizens Bank was to be paid out of the money obtained or to be obtained by George T. Todd from the sale of the property as shown by complainant bill. But this defendant says that he had negotiations with the Kildare Lumber Company for a settlement of his said claim and pending said negotiations, he had agreed, before the service of the injunction in this cause, that the sale was to be postponed for thirty days from the First Tuesday in September, 1893, and that since the service of said injunction he had made no further effort to have said Todd make the sale. This defendant says he has now fully answered said bill, prays to be allowed to file a cross bill.

F. H. PRENDERGAST,
Solicitor for T. J. Rogers.

T. J. Rogers on oath says he has read the above answer and knows the contents thereof, and that the matters and things therein stated are true.

T. J. ROGERS.

Sworn to and subscribed before me, this the 3rd day of November 1893.

C. DART, Clerk.
By W. E. SINGLETON, Deputy.

Endorsed U. S. Chy. No 38. The National Bank of Commerce. of Kansas City, Mo., vs. The Kildare Lumber Company, et al.

Answer of T. J. Rogers, for Citizens Bank. Filed November 3rd, 1893. C. Dart, Clerk, by. W. E. Singleton, Deputy.

In the United States Circuit Court in and for the Eastern District of Texas.

The National Bank of Commerce,
vs. } In Chancery.
Kildare Lumber Company, et al.

Now Comes the respondent Atlanta Bank and answering the complainants bill in this cause filed and for answer doth say, that it denies all, and singular, the allegations in said bill contained, in so far as the same assail and attack the validity of the claim and debt of this respondent against the Jefferson Lumber Company and the lien held by these respondents upon the property described in the bill of complaint and of this put themselves upon the country.

And especially answering herein the said respondent further denies that at the time of the issuance and granting of the writ of injunction herein, that they were doing, or threatening to do, or perform, any act relative to a sale or other disposition of the property of the said Kildare Lumber Company. But on the contrary show the fact to be that they had requested and directed the said G. T. Todd, substitute trustee, to desist and refrain from making any sale of said property on the account of these respondents. And that the said Todd had already desisted and declined to so make said sale and the matters affecting the same had been amicably adjusted between these respondents and the said Kildare Lumber Company.

That it is not true, and respondents especially deny, that the said deeds of trust executed by said Jefferson Lumber Company, as mentioned in the complainants bill. were executed by said Company, and by J. H. Bemis as president thereof without lawful authority so to do, or in fraud of the rights of the other creditors of the said Company, but on the contrary shows to the courts and charges the fact to be that at the time of the execution of said deeds of trust by the said Jefferson Lumber Company, to W. R. Camp, trustee, the said Jefferson Lumber Company were justly indebted to these respondents in to-wit: the full sum named in said deeds of trust and that the said Jefferson Lumber

Company was at the time indebted to various and divers other persons as named in the said deeds of trust and that the said deeds of trust were so executed by the said Jefferson Lumber Company in good faith and for the purpose of securing to these respondents and the other creditors named in said deeds of trust, the payment of the said several sums of money as therein specified, and that said deeds of trust were executed as aforesaid, long before the filing of the suit of the complainant, bank, against the said Jefferson Lumber Company in this Honorable Court.

And further specially answering herein, these respondents further say, that their said indebtedness againt the said Jefferson Lumber Company as aforesaid, is evidenced by certain written obligations of the said Jefferson Lumber Company, and amounting, in the aggregate, to the sum of nine thousand, three hundred and seventy-three and seventy-four hundredths ($9,373.74) dollars, principal besides interest, as will be shown upon the trial hereof, and that by reason of the execution and delivery of the said written obligation as aforesaid, the said Jefferson Lumber Company became liable, bound and promised to pay to these respondents the said several sums of money as therein specified, according to the legal tenor and effect thereof. And by reason of the execution and delivery of the said deeds of trust to W. R. Camp, trustee as aforesaid, these respondents have first and superior lien upon all the property as therein described, to secure the payment of their said debt against the said Jefferson Lumber Company as aforesaid.

And for further answer herein, these respondents further show to the Court the fact that their said debt against the said Jefferson Lumber Company, is still due and wholly unpaid, although demands for payment have been frequently made, all of which has been of no avail, and that the said Jefferson Lumber Company has wholly failed, and refused to pay the same, or any part thereof, to the damage of these re-

spondents in to-wit: the full sum of ten thousand dollars.

6 And for further answer, these respondents say, and show to the Court, that the said property of the Jefferson Lumber Company embraced in the said deeds of trust, as shown by the bill of complainants, was sold under an order of the District Court of Marion County, made and entered of record in said Court, in a cause therein pending, styled Galveston National Bank vs. Jefferson Lumber Company, and in which said cause there was a Receiver of the property of said Company appointed by the said District Court of Marion County, Texas, and that the said Court appointed H. A. O'Neal and E. A. Allday, as commissioners to make the sale of all of said property, and that under the terms of said order of sale so made and entered of record by the said Court, the sale was made by said commissioners, subsequent to the said deeds of trust, executed and delivered to the said W. R. Camp on July 7th, 1891, as shown by the complainants bill herein. That at said sale, the said property, which was of the reasonable value of three hundred and fifty thousand dollars, was sold by said commissioners, at public outcry, for the sum of thirteen thousand dollars, and that at said sale, W. B. Ward, W. B. Chew, John M. Bemis and Elijah Robinson, became the purchasers thereof, and that in said transaction, the said Elijah Robinson acted for and in behalf of the complainant herein who paid the purchase price for the same, and that the deed from the said commissioners to the said purchasers recite upon its face, that the said sale was so made in pursuance to the said order of Court, and subject to the said deeds of trust theretofore executed by the Jefferson Lumber Company to W. R. Camp as aforesaid, and that the said complainant, Bank, well knew when it purchased the said property, that the same was encumbered by the said deeds of trust, and bought the said property subject to the same. That by reason of these facts the said complainants are estopped now from

denying the validity of the said deeds of trust.

7 And for further answer herein these respondents say that the said complainant Bank herein are further estopped from denying the validity of the said deeds of trust from the fact that the complainant has in connection with the said other purchasers of said property at the sale as aforesaid, organized a new corporation and company now known as the Kildare Lumber Company; said organization having been perfected immediately after the purchase of the said property by them and out of the corpus of the property so purchased by them, and that in said organization stock was issued to the amount of something near three hundred thousand dollars and the obligations of the said new company executed for something over seventy-five thousand dollars, and that in said organization there was a recognition by the said company (Kildare Lumber Co.) of the validity of the said preferred claims against the said Jefferson Lumber Company, and many of the creditors named in said deeds of trust were admitted to a participation in the same and that it was agreed and understood that all such preferred creditors as were named in said deeds of trust should be entitled to take stock in the said Company to the full amount of their respective debts and claims against the said Jefferson Lumber Company. That this agreement and proposition was also submitted to these respondents who declined to take stock in the said new company and demanded that their said debt be paid or further secured by the obligation of the said Kildare Lumber Company; that so many of the said preferred creditors as took stock and other obligations of the Kildare Lumber Company for their several debts against the Jefferson Lumber Company, executed and delivered to the said Kildare Lumber Company, releases and full acquitances against all their rights, title and interest in the property under the said deeds of trust as aforesaid. That the said Kildare Lumber Company, became the purchaser

of the property of the old Jefferson Lumber Company, by and through the said W. B. Ward, W. B. Chew, Jno. M. Bemis and Elijah Robinson, as aforesaid, well knowing the title it was acquiring and that they, the said Ward, Chew, Bemis and Robinson had purchased the same subject to the deeds of trust executed by the Jefferson Lumber Company to W. R. Camp as aforesaid.

8 That since the organization of the said Kildare Lumber Company, and prior to the filing of the complainants bill herein the said Kildare Lumber Company, has recognized and reaffirmed the validity of the claim of these respondents and their lien upon the property of the said company, and that in recognition of the justness of the same the said Kildare Lumber Company, did on or about the 26th day of August for the purpose of adjusting and further securing to these respondents in the payment of their said debt against the said Jefferson Lumber Company, and against the said property of the Kildare Lumber Company, delivered to these respondents certain other written obligations of the Kildare Lumber Company in to-wit the full amount of the debt of these respondents against the said Jefferson Lumber Company, the same being drafts drawn by the said Kildare Lumber Company upon the Bemis Lumber Company, payable at various days and dates and duly accepted by the said Bemis Lumber Company. That at the time of this transaction it was understood that the said written obligation should be held by these respondents as collateral security for the said debt against the said Jefferson Lumber Company, these respondents especially providing by contemporaneous writing that they thereby in a manner or sense would waive their rights under the two deeds of trust hereinbefore referered to. That it was upon this adjustment of said matter that these respondents agreed to hold up the sale advertised by the said Geo. T. Todd as substitute trustee,

and that the paper then delivered to these respondents matures as aforesaid at various times hereafter. That no part therof is now due and that when said claims are paid off and discharged they stand ready to cancel and satisfy the said deeds of trust so far as they are concerned.

9. Premises considered these respondents pray that their said lien under and by virtue of the said deeds of trust be declared and adjudged prior and superior to that of the complainants herein so far as the property embraced therein is concerned, and that in case of foreclosure by complainants that these respondents have judgment for their said debt and for a foreclosure of their lien upon their property covered by the said deeds of trust as aforesaid and for such other and further relief as they may be entitled to and will ever pray, &c.

O'NEAL & ALLDAY,
Solicitors for Respondent, Atlanta Bank.

THE STATE OF TEXAS, }
Marion County. }

Before me the undersigned authority this day personally appeared A. C. Smith, one of the parties in the firm of Atlanta Bank, who after being by me duly sworn deposes and says that the matter of facts stated in the foregoing answer are true in substance and in fact. A. C. SMITH.

Sworn to and subscribed before me, this the 4th day of November, A. D. 1893.

C. DART, Clerk.
By W. E. SINGLETON, Deputy.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Missouri, vs. The Kildare Lumber Company et al.

ANSWER OF ATLANTA BANK.

Filed Nov. 4th, A. D., 1893. C. DART, Clerk.
By W. E. SINGLETON, Deputy.

In the United States Circuit Court for the Eastern District of Texas at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri. vs. Kildare Lumber Company, W. R. Camp, Geo. T. Todd, The Atlanta Bank, Citizens Bank, J. H. Bemis, W. B. Ward and L. S. Schluter.	Chy. No. 38.

The joint and several demurrer of J. H. Bemis, W. B. Ward and the Kildare Lumber Company, three of the defendants in the above cause to complainant's bill of complaint.

These defendants by protestation not confessing or acknowledging all or any of the matters or things in said bill of complaints contained to be true in such manner and form as the same are therein set forth doth demur to said bill and for causes of demurrer showeth.

1. Because as appears from said bill the complainants set up its rights as a creditor of the Kildare Lumber Company for a sum of about $30.000.00 which is alleged to be secured by a mortgage or trust deed on certain property described in said bill and complaint and seeks judgment for its debts and a decree of foreclosure of the mortgage an order of sale to pay the same, to this much of said bill there is no allegation that the said J. H. Bemis is a necessary or proper party nor that he has any interest in said suit. Said bill also sets up said complainants rights as a stockholder in defendant company, the Kildare Lumber Company, and seeks to have J. H. Bemis removed from his office as general manager of the affairs of the Kildare Lumber Company, defendant, and as to this part of the complainants bill there is no allegation that W. R. Camp, Geo. T. Todd. L. S. Schluter or the Atlanta Bank, nor the Citizens Bank have any interest.

Wherefore these defendants demur and say that said bill is multifarious.

2. These defendants do further demur and say that part and so much of said bill as sets up and seeks to maintain this suit as a stockholder, the said bill is not sufficient because complainant does not allege that it is the legal owner and holder of any stock in the Kildare Lumber Company. And said complainant does not allege any such title to any of the stock of the Kildare Lumber Company as will permit them to sue in a court of equity.

3. These defendants do further demur to said bill in so as this suit is attempted to be mantained by the complainant as a stockholder, because said bill does not set forth with particularity the efforts the plaintiff has made to secure such action as it desired on the part of the managing directors, nor of the shareholders, nor does it state the cause of its failure to obtain such action.

4. These defendants further demur and say that said bill so as it seeks a discharge from these or either of these defendants, the said bill is insufficient and uncertain and does not attach any interrogatories to said bill nor make any allegations showing these defendants the matter nor what it is about which it is desired that these defendants or either of them should discover or make answer to.

5. These defendants further demur and say the complainants bill shows there was some credits and payments made on the debt sued on, but does not show the amount paid, nor the date when paid, wherefore said bill does not show that the amount in controversy is more than $2,000. and does not show that the amount sued for is in the jurisdiction of this court.

6. These defendants also demur and say that one of the notes sued on to-wit: the note for $10,049.60, due eighteen months from date, is not due and was not

due when this suit was filed as appears from complainant's bill, as there is no allegation justifying a suit on a note not due.

Wherefore these defendants pray judgment of the court whether they or either of them shall make further answer to said bill and further pray to be dismissed with their costs.

W. T. ARMISTEAD,
Attorney for Defendants.

I, W. T. Armistead, of counsel for the above defendants certify that the foregoing demurrers to the bill of complaint is in my opinion well founded in point of law.

W. T. ARMISTEAD,
Attorney for Defendants.

Jefferson, Texas, November 3rd, 1893.

We, J. H. Bemis, W. B. Ward and Kildare Lumber Company, by W. B. Ward, President, on oath, say the foregoing demurer is not interposed for delay.

J. H. BEMIS,
W. B. WARD,

State of Texas. }
County of Marion. }

Personally appeared before me, the undersigned authority, J. H. Bemis and W. B. Ward, individually, and as President of the Kildare Lumber Company, who, after being by me duly sworn, on oath, says that the foregoing demurrers are not interposed for delay.

Witness my hand and official signature and seal this November 3rd, 1893.

J. A. ARMSTEAD,
Justice of the Peace and Ex-Officio Notary Public, Marion County, Texas.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Missouri, vs. The Kildare Lumber Company, W. R. Camp. George T. Todd, The Atlanta Bank, Citizens Bank. J.

H. Bemis, W. B. Ward and L. S. Schluter.
DEMURRERS BY SAME DEFENDANTS.
Filed November 4th, 1893. C. Dart, Clerk, by W. E. Singleton, Deputy.

W. T. ARMISTEAD,
Solicitor For Defendants.

In the United States Circuit Court, Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.,
vs.
Kildare Lumber Co., W. R. Camp, Geo. T. Todd, the Atlanta Bank, Citizens Bank. J. H. Bemis. W. B. Ward and L. S. Schluter. } Ch. No. 38.

The disclaimer of W. R. Camp, one of the defendants in the above cause. This defendant saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exception, and otherwise, that can or may be had or taken to the many imperfections, and intervention in the said complainants bill of complaint contained for answer thereunto, or to so much and to such parts thereof as he is advised is material for him to answer unto, he answers and says:

That he doth fully and absolutely disclaim all manner of right, title, and interest whatsoever in and to any of the property set out and described in complainants bill of complaint.

This defendant says he was made trustee in a certain trust deed executed by the Jefferson Lumber Company on July 7th, 1891, covering a large amount of property as in complainants bill alleged, but long since, and before this suit was filed, to-wit: on .....day of ..... , 1892, he, this defendant,

renounced said trust and declined to act further as trustee in said trust deed, and he has now and had when this suit was brought, no interest whatever in said trust deed, or in the execution of said trust, and he is advised, and believes, that complainants herein were fully advised of his renunciation of said trust before this suit was filed.

This defendant is advised, and believes, that said trust deed executed by the Jefferson Lumber Company to him on July 7th, 1891, to secure certain creditors, was a valid deed and trust for the purpose therein named.

And further, this defendant has no knowledge, remembrance, information, or belief, about the matter set out in complainants bill.

All of which matters and things, this defendant is ready to aver, maintain and prove, as this Honorable Court shall award.

Wherefore, he prays to be dismissed with his cost.

F. H. PRENDERGAST,
Solicitor for W. R. Camp.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Missouri, vs. The Kildare Lumber Company, et. al.

DISCLAIMER OF W. R. CAMP.

Filed November 4th, 1893. C. Dart, Clerk, by W. E Singleton, Deputy.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.
vs.
Kildare Lumber Company.

Now comes the complainant, the National Bank of Commerce, of Kansas City, Missouri, and moves the Court to set down for hearing the defendants' demurrers, filed in this cause, on the 4th day of November,

1893, and pray the Court that same be set down for hearing on the first day of the next term of the Court at Jefferson, being the 22nd day of January, 1894.

J. H. CULBERSON,
Solicitor for Complainant.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City. Missouri, vs. Kildare Lumber Company, et. al.

Setting down for hearing, the demurrers of Kildare Lumber Company, et. al. Filed December 4th, 1893. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court for the Eastern District of Texas at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri, vs. Kildare Lumber Company, } Chy. No. 38.

The plea of the Kildare Lumber Company, one of the defendants to the bill of complaint of the National Bank of Commerce, of Kansas City, Mo., plaintiff.

This defendant by protestation, not confessing or acknowledging the matters and things, in and by said bill set forth and alleged to be true otherwise than is hereafter expressly admitted for plea to the whole of the said bill or to so much and such part thereof as it is advised, it is material for it to plead, saith:

That it is true as alleged in the plaintiff's bill that this defendant executed and delivered to the plaintiff the several promissory notes, in writing, and also the trust deed or mortgage to secure the same, all as alleged and declared on in the plaintiff's said bill for decree of foreclosure herein. But the defendant says that at the time of the execution and delivery of the said notes and mortgage as aforesaid, the plaintiff, the National Bank of Commerce of Kansas City, Mo., was

the holder of certain notes, acceptances, bills payable and choses in action, which had theretofore been delivered to the said plaintiff by the Jefferson Lumber Company and J. H. Bemis & Co. That said notes, acceptances, and choses in action, were evidences of indebtedness against divers and sundry parties, including the said Jefferson Lumber Company, J. H. Bemis and J. H. Bemis & Co., as well as other parties, and the sum of all said papers, amounting in the aggregate to about sixty-nine thousand, three hundred and ten, 14-100 ($69,310 14-100) dollars, a specific and itemized statement of which said papers is now filed among the papers in this cause and set forth in Exhibit "A" attached to motion to discharge the Receiver, filed September 7, 1893, and will be exhibited to the Court and is here referred to for particular description. This defendant says that on the .... day of 18..., the said Jefferson Lumber Company, formerly a private corporation doing business and having its principal office in the city of Jefferson, Marion County, Texas, became insolvent and a Receiver was appointed to take charge of the property of the same, by the Hon. John L. Sheppard, Judge of the District Court of Marion County, Texas, and said Receiver, to.wit: Hardy A. O'Neal, Esq., qualified under said appointment, and took and retained possesion, charge and control of all the property and assets of the said Jefferson Lumber Company. That the said Receivership proceedings were duly administered in the District Court of Marion County, Texas, and on ..... day of .....1891, the said District Court made its final order or decree, ordering the sale by said Receiver of all property of said Jefferson Lumber Company, both real and personal, being the aggregate value of about $250,000, (two hundred and fifty thousand dollars). That on to-wit: on the 3rd day of May, 1892, all the said property of the said Jefferson Lumber Company was, by the said Hardy A. O'Neal, Receiver as aforesaid, duly and regularly sold under and in acordance of the said order

and decree of the said District Court of Marion County, Texas, and at the said sale one W. B. Ward, one J. M. Bemis, one W. B. Chew, and one Elijah Robinson became, and were the purchasers of all said property of the said Jefferson Lumber Company, jointly, and the said property and all the said property, with proper assurances of title thereto, and the possession thereof, was by the said Hardy A. O'Neal, Receiver, duly delivered to the said purchasers, W. B. Ward, J. M. Bemis, W. B. Chew and Elijah Robinson. That in the making of said purchase, and in all things pertaining thereto, the said W. B. Ward acted for himself and for the National Bank of Jefferson, of which he was President, which said Bank was a large creditor of the Jefferson Lumber Company. That the said J. M, Bemis and W. B. Chew were also creditors of the said Jefferson Lumber Company, and that the said Elijah Robinson in making said purchase, and in all matters pertaining thereto acted not in his own behalf, but solely in the capacity of the duly authorized agent and attorney of the National Bank of Commerce, of Kansas City, Mo., the plaintiff herein, That said sale, by said Receiver, and delivery of the property thereto, and all proceedings had in relation thereto were, on, to-wit: the .. day of June, 1892, duly and regularly confirmed and approved by the said Court of Marion County, Texas, and all the proceedings of said Court, including all decrees and orders of sale and confirmation are here referred to, and duly authenticated transcripts thereof, will be shown to this Court.

That, after the purchase of said property by the said Ward, Bemis, Chew and Robinson, the latter acting for and in behalf of the plaintiff herein, by mutual agreement between all parties, this defendant, the Kildare Lumber Company, a private corporation was formed and organized, and the said W. B. Ward, was chosen President thereof and J. H. Bemis general manager, and the said Elijah Robinson, one of the Directors of the

said corporation. That in purchase of said property, by said parties, the formation and organization of this defendant corporation was in contemplation and all the said property so purchased by them was to become and did become a part of the assets of the said corporation. That the capital stock of said corporation was fixed at the sum of $ ....000, and it was agreed among the incorporators thereof, that the said W. B. Ward and the said J. M. Bemis and the National Bank of Commerce of Kansas City, Mo., as a plaintiff herein, should deliver up and surrender for cancellation all notes, bills payable and choses in action held by each of them respectively, upon which the Jefferson Lumber Company, J. H. Bemis and J. H. Bemis & Co., were legally bound and liable; that the same should be extinguished, and that in lieu of, and in consideration thereof the said creditors, including the plaintiff herein should receive a certain amount of the shares of the capital stock of the Kildare Lumber Company, and a certain amount of promissory notes of the said Kildare Lumber Company.

That in pursuance of said agreement and arrangement, shares of the capital stock of the defendant, the Kildare Lumber Company, to the amount of $39,161,-37, and the promissory notes in writing of the Kildare Lumber Company to the amount of about $30,148,17. (being the same notes declared on by plaintiff herein) were executed and delivered to the plaintiff, the National Bank of Commerce, of Kansas City, Mo., together with the mortgage and trust deed mentioned in plaintiff's bill to secure the payment of said notes. That it was expressly understood, stipulated and declared that the said stock and the said notes so executed and delivered by this defendant to the plaintiff, should be in lieu of and should constitute a payment and extinguishment of all the notes, acceptances, bills payable and choses in action and evidences of indebtedness, hereinbefore referred to, held by the plaintiff against the Jefferson Lumber Company, J. H. Bemis

and J. H. Bemis & Co., upon which they or either of them or any other parties were bound and liable and it was expressly agreed by the plaintiff herein, that in consideration of the execution and delivery of the said shares of stock and the said notes of this defendant, the said plaintiff the National Bank of Commerce, of Kansas City, Mo., would forthwith surrender and deliver up to the parties thereto entitled for payment and cancellation all of the said notes, acceptances, bills payable and choses in action to the amount and extent of about $70,000, (Seventy thousand dollars) as herein above stated, and on the 13th day of July 1892, the plaintiff, the said National Bank of Commerce of Kansas City, Mo., by its duly authorized attorney, made executed and delivered to J. H. Bemis, General Manager of the Defendant, its agreement and obligation in writing so to do which written agreement is on file among the papers of this cause and is here referred to and will be exhibited to the court. But this defendant says that the plaintiff wholy ignoring and violating said agreement has retained and does still retain in its possession all of the said notes, acceptances, bills payable and choses in action and has persistently refused and does still refuse to surrender and deliver up the same or any part thereof to this defendant or to anyone else thereto entitled, though often requested so to do, and the same are still outstanding as obligation and evidences of indebtedness against the various parties thereto. Defendant says that the said notes, acceptances, bills receivable and choses in action by reason of the premises became and are justly and equitably the property of this defendant, and this defendant is entitled to possession of same and all and every one of the rights arising from such ownership and possession; that the delivery and surrender of the same by the plaintiff to this defendant constituted and was and is the sole and only consideration for the shares of capital stock and the promissory notes of this defendant now held by

the plaintiff and involved in controversy in this suit, and unless the same shall forthwith be delivered and surrendered as required by the agreement herein above mentioned, there is and will be a total failure of the consideration of the notes declared on by the plaintiff in this case and the shares of stock of the Kildare Lumber Company, held by the plaintiff herein.

Wherefore all which matters and things thls defendant doth aver to be true and it pleads the same to the said plaintiff's bill and to so much thereof as seeks and prays for judgment for the amount. of the notes sued on and decrees for foreclosure of the mortgage declared on in the said bill and prays judgment of this Honorable Court whether it should be compelled to make any other or further answer to the said bill and prays to be hence dismissed with cost and charges in this behalf most wrongfully sustained.

TODD & RODGERS,
Solicitors for Defendant, K. L. Co.

I. W. T. Armistead, hereby certify that this plea in my opinion is well founded in point of law.

State of Texas. }
County of Marion. }

Personally appeared before me the undersigned authority W. B. Ward, who after being by me duly sworn on oath, says that he is the president of Kildare Lumber Company, defendant, and that he is familliar with all the tranactions refererd to in the foregoing plea, and that he has read said plea and knows the contents thereof, and that the matters therein stated are true except as to the matters stated on information and belief therein, and as to those he verily believes them to be true and that this plea is not indisposed for delay.

W. B. Ward.

Sworn to and subscribed before me this the 5th day

of February, A. D. 1894.

C. DART, Clerk,
By W. E. SINGLETON, Deputy.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Campany, et al.

The plea of Kildare Lumber Company, to the complainant's bill. Filed February 5th, 1894. C. Dart Clerk. by W. E. Singleton, Deputy.

In the United States Circuit Court for the Eastern District of Texas at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri, vs. Kildare Lumber Company, et al. } No. 38. In Equity.

THE ANSWER OF J. H. BEMIS TO THE COMPLAINANTS' BILL.

The defendant, J. H. Bemis, now comes and makes the following answer to the complainants' bill, and answering, says, that he denies all the allegations contained in the complainants' bill except as herein expressly admitted, and as all the matters complained of against this defendant have been waived, adjudicated or held in obeyance by the order of court, he reserves to himself the right to answer, and express his willingness to do so whenever required to do so by the court, and he demands strict proof of all the matters and things complained of in said bill unless the same can be satisfactorily arranged.

G. J. ARMISTEAD,
Solicitor for the Defendant, J. H. Bemis and of Counsel.

JEFFERSON, TEXAS, February 5th, 1894.

Endorsed: U. S. Chy. No. 38. National Bank of

Commerce, of Kansas City, Missouri, vs. The Kildare Lumber Company, et al.

ANSWER OF J. H. BEMIS, DEFENDANT, TO THE COMPLAINANTS' BILL.

Filed Feb. 5th, A. D., 1894. C. DART, Clerk.
By W. E. SINGLETON, Deputy.

In the Circuit Court of the United States, within and for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, et al. } No. 38, In Equity.

The answer of W. B. Ward, to the complainants' bill and the setting up of the rights and interests in the notes and the deed of trust referred to in the complainants' bill.

Now comes W. B. Ward and admits that on the 13th day of July, A. D. 1892, Kildare Lumber Company, excuted and delivered all the notes set out in the complainants' bill and said defendant also admits that on said date the said Kildare Lumber Company made, executed and delivered its certain deed of trust to L. S. Schluter, Trustee, for the purpose of securing all of the notes set out in said bill.

2. The said defendant, W. B. Ward, respectfully shows to the court that he is the owner and holder for value received of the note embraced in the complainants' bill, made, executed and delivered to John M. Bemis on the 13th day of July, 1892, by the said Kildare Lumber Company whereby it promised to pay to said Bemis four months after the date thereof the sum of $2000.00 with interest thereon from date at the rate of six per cent per annum, and that the same is past due and wholly unpaid; and also defendant, W. B. Ward, is the owner and holder of one other promissory

note made, executed and delivered on the 13th day of July, 1892, by the Kildare Lumber Company, whereby it promised to pay the said defendant, W. B. Ward, four months after the date thereof the sum of $2500.00 with interest thereon from date at the rate of six per cent. per annum and that the same is past due and unpaid, and the defendant especially admits the execution and delivery of these two notes, now owned and held by this defendant, as set out in complainants' bill, and said defendant, W. B. Ward, shows that said two notes are secured by the deed of trust set out in the complainants' bill and shows that for a complete and full adjustment of the matter embraced in the said deed of trust that this defendant is entitled to have his lien foreclosed to satisfy the principal and interest due on said two notes belonging to him as aforesaid in the judgment in this Court when finally rendered.

Wherefore this defendant prays that he may have judgment against the said Kildare Lumber Company for the amount of the two notes, principal and interest, set forth in this answer executed by the Kildare Lumber Company as above mentioned and that said sum when ascertained, is the amount due to this defendant by reason of the notes and the deed of trust set forth in the complainants' bill and that the equity of redemption of the said Kildare Lumber Company in and to the property conveyed by it to the said Schluter in trust as stated in complainants' bill and that the lien of this defendant be foreclosed and said property sold for the payment of the amount due on the indebtedness by the said deed of trust secured and especially to satisfy the lien and debt of this defendant and for such other and further relief as this defendant, W. B. Ward, may be entitled in the premises and as in duty bound will ever pray.

G. J. ARMISTEAD,

Solicitor for the Defendant, W. B. Ward, and of Counsel.

Jefferson, Texas, February 3rd, 1894.

The State of Texas, } Personally appeared before me the undersigned, W. B. Ward, who, being by me duly sworn, on oath, says that the matters and things set forth in the foregoing answer of W. B. Ward the defendant are true.

W. B. WARD.

Subscribed and sworn to before me this the 5th day of February, A. D., 1894.

C. DART, Clerk,
By W. E. SINGLETON, Deputy.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Missouri, vs. The Kildare Lumber Company, et. al.

Answer of W. B. Ward, to complainants' bill, and setting up his interest. Filed February 5th, 1894. C. Dart, Clerk, by W. E. Singleton, Jr., Deputy.

The National Bank of Commerce of Kansas City, Mo.	Complainant. No. 38.
vs.	In Equity.
The Kildare Lumber Company, et al	Defendants.

Now at this day comes said parties by their respective attorneys and demurrer hereto filed by J. H. Bemis, W. B. Ward and Kildare Lumber Company, coming on to be heard is by said defendants by leave of the Court and by consent of said complainant withdrawn; and it thereupon ordered by the Court that said complainant have, and it is hereby given leave to file herein an amendment to its bill herein setting up the maturity of the third note mentioned in said bill as having been executed by said Kildare Lumber Company to Elijah Robinson and by him assigned and transferred to said complainant; and leave is also given said complainant to amend said bill by inserting in the blank therein the amounts paid on each of said notes executed to said Robinson.

And it is further ordered by the Court that said de-

fendants answer on or before next rule day of this court, so much of said complainants' bill as pertains to and seeks a foreclosure of the deed of trust executed by the Kildare Lumber Company to L. S. Schluter to secure the notes in said bill mentioned, and that he be not required to answer the remainder of said bill until such time as the said complainant may again make application to this court for the appointment of a receiver of the property and assets of said Kildare Lumber Company.

DAVID E. BRYANT, Judge.

Filed January 23rd, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

ORDER.

In the United States Circuit Court for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City. Missouri.
vs.
The Kildare Lumber Company, et al.

Now comes the plaintiff, the National Bank of Commerce, of Kansas City, Mo., and reserving to itself at this time, and at all times hereafter, and saving to itself all benefits and advantages of all demurrers and exceptions and admissions in defendant. T. J. Rogers' answer filed herein on the 3rd day of November 1893, and now replying to said answer of said Rogers deny all and singular the allegations in said answer containing except in so far as said answer admits the facts shown in plaintiff's bill.

J. H. CULBERSON,
Solicitor for Plaintiff.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. The Kildare Lumber Company, et al. Replication to answer

of Citizens Bank,
Filed December 4th, 1893.

C. DART, Clerk,
By W. E. Singleton, Deputy.

In the Circuit Court, of the United States for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce. of Kansas City, Mo.
vs.
The Kildare Lumber Co. et al.

Now comes the National Bank of Commerce, of Kansas City, Mo., and at this term, and at all terms hereafter, answering and saving to itself all benefits and advantages of all the demurrers and exceptions to defendants' answer filed herein and replies to the answer of W. R. Camp, defendant, filed in this cause on November 4th, 1893, and denies all and singular the allegations in said answer contained.

J. H. CULBERSON,
Solicitor for Complainants.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. The Kildare Lumber Company, et al. Replication to answer of W. R. Camp, disclaimer.
Filed December 4th, 1893.

C. DART, Clerk,
By W. E. SINGLETON, Deputy.

The National Bank of Commerce, of Kansas City, Mo.
vs.
Kildare Lumber Company, et al.

In the United States Court for the Eastern District of Texas, at Jefferson.

Now comes the plaintiff, the National Bank of Commerce, of Kansas City, Mo., and at this time and at

all times hereafter reserving and saving to itself all benefits and advantages of all demurrers and exceptions filed herein by the Atlanta Bank on the 4th day of November, 1893, and replying to said answer, demurrers generally to said answer and says same is insufficient in law and further replying to said answer this complainant denies each and all of the allegations in said answer contained.

J. H. CULBERSON,
Solicitor for Plaintiff.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Missouri, vs. The Kildare Lumber Company, et. al. Replication to answer, Atlanta Bank.

Filed December 4th, 1893.

C. DART, Clerk.

By W. E. SINGLETON, Deputy.

In the Circuit Court of the United States, within and for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, et al. } No. 38, Chancery.

Now comes the said complainant, the National Bank of Commerce of Kansas City, Mo. and reserving to itself at this time and at all times hereafter and saving to itself all benefits and advantages and all demurrers and exceptions and admissions in the answer of the defendant, the said Kildare Lumber Company filed herein on the——day of——189—, and replying to said answer of said Kildare Lumber Company says the same is insufficient in law, and denies all and singular the allegations in said answer contained, except in so far as said answer admits the facts contained in plaintiff's bill.

J. H. CULBERSON & ELIJAH ROBINSON,
Solicitors for Complainant.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Campany, et al.

Replication to answer of Kildare Lumber Company. Filed October 2nd, 1893. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court for the Eastern District of Texas at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri, vs. Kildare Lumber Company, et al.

The application of T. J. Rogers, to be allowed to appear and defend for, and in the name of the defendant, the Citizens Bank, is granted. It appearing that the Citizens Bank is in process of liquidation and that T. J. Rogers is the assignee of Citizens Bank.

The said T. J. Rogers is authorized to defend in the above cause for Citizens Bank.

DAVID E. BRYANT,
Judge.

October 2nd, 1893.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Missouri, vs. The Kildare Lumber Company, et. al. Order allowing appearance of T. J. Rogers for Citizens Bank.

Filed October 2nd, 1893.

C. DART, Clerk,
By W. E. SINGLETON, Deputy.

In the United States Circuit Court, Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, et al. } No. 38, Chancery.

Now comes T. J. Rogers who has been allowed by

the order of this Court to defend in above cause for and as trustee for the Citizens Bank, one of the defendants in said cause, and shows to the Court that the said Citizens Bank was, and is a benificiary of and under the trust deed made July 7th, 1891, by the Jefferson Lumber Company to W. R. Camp, trustee, that the amount secured to it by said trust deed, is $10,000.00; said trust deed is set out in complainants' bill in above cause, and is therein claimed to be invalid.

That T. J. Rogers is advised that said trust deed is valid and is a security for said sum of money and he desires to file a cross bill in the above cause setting up his rights under said trust deed and praying for a foreclosure as against the complainants and against the defendants, the Kildare Lumber Company, W. B. Ward and the Atlanta Bank.

And he prays that process on his cross bill may be had on J. H. Culberson, attorney of record for complainant, the National Bank of Commerce, of Kansas City, Missouri, as and because said Bank of Commerce resides and has its office in the State of Missouri, beyond the jurisdiction of this Court.

F. H. PRENDERGAST,
Solicitor for T. J. Rogers.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. the Kildare Lumber Cumpany, et. al.

Permit for T. J. Rogers to file cross bill. Filed November 3rd, A. D. 1893. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court, for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.,	Complainant.
vs.	
Kildare Lumber Co., Citizens Bank, Atlanta Bank, W. R. Camp, W. B. Ward, J. H. Bemis, Geo. T. Todd, and L. S. Schluter.	Ch. No. 38. Defendants.

The cross bill of T. J. Rogers, who has been allowed to appear as Assignee of the Citizens Bank, one of the defendants in the above cause.

Now comes T. J. Rogers and shows to the Court that he resides in Marion County, Texas, and is a citizen of the State of Texas, and complaining of the National Bank of Commerce, of Kansas City, Misssouri, which is a National Banking corporation, and is a citizen of the State of Missouri, The Atlanta Bank, a citizen of the State of Texas, The Kildare Lumber Company, a corporation and a citizen of Texas, and the Jefferson Lumber Company, a corporation, and a citizen of the Eastern District of Texas, and W. B. Ward, and shows to the Court:

2. That heretofore, to-wit: On July 21st, 1891, the said Citizens Bank became insolvent, and on that day, by an order passed by its Board of Directors, appointed this defendant, complainant in this cross bill, Assignee of said Citizens Bank, with authority to collect all of its debts, and that said Rogers accepted said trust, and immediately entered upon his duties as Assignee, and he is still acting as such.

3. That on July 7th, 1891, the Jefferson Lumber Company was justly indebted to said Citizens Bank in the sum of $9,486.07, bearing eight per cent. interest from July 1st, 1891.

4. That on July 7th, 1891, said Jefferson Lumber Company executed three mortgages to W. R. Camp, trustee, conveying to him all the land and property set out in Exhibit A, B and C.

5. That said trust deeds were made to secure the following named parties and amounts set opposite their names (said names and amounts are shown in Exhibit D hereto attached) and said Exhibit D shows the order of priority in which said debts thereby secured are to be paid.

6. This defendant, complainant, says he is informed and believes that all and each of said debts, as shown in Exhibit D have been settled or paid, unless perhaps the Atlanta Bank has not been fully paid, that all the debts mentioned in either Exhibit A or in Exhibit B have been paid, unless it is the Atlanta Bank, and this defendant debts.

7. That after the execution and recording of said trust deeds to W. R. Camp, to-wit: on July 7th and 8th, 1891, the District Court of Marion County, Texas, at the suit of the National Bank of Galveston vs. Jefferson Lumber Company, appointed H. A. O'Neal receiver who as such took charge of all the property mentioned in Exhibit A, B and C hereto attached, and on May 3rd, 1892, said H. A. O'Neal and E. A. Allday under order of said District Court of Marion County, sold said property at public sale to W. B. Ward, W. B. Chew, Jas. M. Bemis, and Elijah Robinson, for the sum of $13,000 and the sale was by the Court confirmed on .....day of June, 1892, subject to the deed of trust made by said Jefferson Lumber Company to W. R. Camp, dated July 7th, 1891, said sale was by the Court approved with the qualification that the purchasers take the property subject to the rights of the beneficiaries under the trust deed to W. R. Camp aforesaid.

8. That the purchasers of said property then organized the Kildare Lumber Company and transferred all of said property to said Kildare Lumber Company and the same is now held by them.

9. The order directing property to be sold by H. A. O'Neal and E. A. Allday was made by the

District Court of Marion County on January 21st, 1892, and in the cause of the National Bank of Galveston vs. Jefferson Lumber Company and said order recited that said sale be made without prejudice to any person asserting any lien on or title to said property.

10. This complainant, defendant, says that by the execution and recording of said trust deeds to W. R. Camp on July 7th, 1891, a valid lien was created thereon in favor of the Citizens Bank to secure the said $9486.07 and interest, that the whole amount thereof is now due and unpaid, and that the right to collect the same passed to this defendant by his appointment as assignee on July 21st, 1891.

11. That W. B. Chew, W. B. Ward, Jas. M. Bemis and Elijah Robinson, purchased said property with a full knowledge of this defendant's claim and by virtue of the order of the District Court of Marion County, ordering said property sold and by the order confirming the sale thereof, said purchasers took said property subject to said lien and are estopped to deny the validity thereof.

12. That they paid only $13,000.00 for the property when the same was worth at the time more than two hundred thousand dollars. That said property sold for so small an amount because it was sold subject to the debts set out in the trust deed to W. R. Camp.

13. This defendant, complainant, says that the Jefferson Lumber Company is wholly and totally insolvent and that it owns no property,credits nor assets of any kind.

That it abandoned its corporate existence and ceased its business of any kind since its property was sold by H. A. O'Neal and E. A. Allday on May 3rd, 1892, and all of its property was then and there sold and passed to the Kildare Lumber Company as aforesaid.

J. H. Bemis, who is a citizen of Texas and a resident of Marion County, was the President of the Jeffer-

son Lumber Company on May 3rd 1892.

To this end defendant, complainant, says that it is unnecessary to make the Jefferson Lumber Company party defendant but if the court should hold that the Jefferson Lumber Company is a necessary party to this cross bill, then this defendant now here suggests and makes known to the court that the said Jefferson Lumber Company is a necessary party to the relief prayed for in that part of complainants' bill seeking to have cancelled and held for naught the trust deeds made July 7th and 8th, 1891 by the Jefferson Lumber Company to W. R. Camp and that is the portion of Complainants' bill which makes necessary this cross bill.

15. This defendant says that the cause now pending was filed by the National Bank of Commerce, August 28th, 1893, against the defendant herein and by an order of this court L. S. Schulter was appointed Receiver of the Kildare Lumber Company's property; that he was discharged from Receivership on October 21st, 1893, on motion of the Kildare Lumber Company that T. J. Rogers has answered herein for the Citizens Bank and the Kildare Lumber Company and W. B. Ward and J. H. Bemis have demurred to complainant's bill at the November Rule day 1893.

16 That the Atlanta Bank has other security than the trust deed to W. R. Camp to wit: it has the personal obligation of the Kildare Lumber Company and the Bemis Lumber Company, both of them being amply solvent.

17 Wherefore this defendant suing herein in this cross bill as assignee of the Citizens Bank, prays for process of subpoena against the National Bank of Commerce, of Kansas City, Mo., to be served on J. H. Culberson, their solicitor of record and against the Kildare Lumber Company, W. B. Ward, the Atlanta Bank, and if the court holds that the Jefferson Lumber Company is a necessary defendant they pray also for a subpoena against the Jefferson Lumber Company to appear and answer this Cross bill, and he

prays that this debt be established against the property set out in Exhibit "A" "B" and "C," thereto attached and declared to be a mortgage lien on said property prior and superior to the debt of complainant and W. B. Ward.

And he prays that the said Atlanta Bank be decreed to exhaust its remedy against the Kildare Lumber Company, and the Bemis Lumber Company, to secure what is yet due it on the debt secured by the mortgage to W. R. Camp before it can come against said property conveyed in the mortgage to W. R. Camp on which this defendant has a lien.

F. H. PRENDERGAST,
Solicitor for T. J. Rogers, Assignee.

Personally appeared T. J. Rogers and on oath says the matters and things stated in the foregoing cross bill are true.

T. J. ROGERS.
By W. E. Singleton, Deputy.

Sworn to and subscribed before me this the 20th day of November A. D. 1893.

C. DART, Clerk,
by W. E. Singleton, Deputy.

Exhibit "A" attached to the cross bill of T. J. Rodgers Assignee of the Citizens Bank in the cause, Chancery 38 in the United States Circuit Cort of Eastern District of Texas at Jefferson.

The National Bank of Commerce of Kansas City, Mo.	Complainant.
vs.	
The Kildare Lumber Company, et al	Defendants.

LAND AND LUMBER.

Original Grantee.	No. Acres.
Jas. Jones	640
Peter M. Keeton	175 8-10

BLOCK 34 IN KILDARE, TEXAS.

Original Grantee.	No. Acres.
W. Smith	320
Geo. S. Young	1000
B. B. B. & C. R. R. Co.	640
Geo. S. Young	545
James Clark	800
John Hall	114 2-10
Richard Barrington	320
N. C. Graham	320
Sherrod Dunman	553½
Sherrod Dunman	380½
B. B. B. & C. R. R. Co	79 15-100
Daniel Frazier	160
Riley Pruitt	160
Jane Richie, Atlanta	9
Jessie Waller	320
Wm. Donehues	208
Fisher & Miller	334⅓
Jas. W. Evans	125½
The right of way for a tramway over Peter M. Keeton survey, 10 feet wide.	
E. T. Jackson	160
Jane Richie, Atlanta	1 15-100
All the above land in Cass County, Texas; also all timber on the following tracts.	
John Lick	100
Dixon Dier	212
Dixon Dier	50
J. N. Simmons	320
J. A. Welborne	80
Wm. Wilson	100
K. A. Welborne	60
A. D. Duncan	900
K. A. Welborne	553 1-2

M. D. Frazier	72
Coral Simmons	160
T. J. Foster	277
Evan Watson	430
J. B. Boice	140
N. J. Wilson	160
Howell & Jones & A. Taylor	275
Howell & Jones	200

All in Cass county, Texas.

Fully described in the trust deed from J. H. Bemis, President of the Jefferson Lumber Company, to W.R. Camp, trustee, dated July 7th, 1891, and recorded in Cass county, Texas, on July 8th, 1891.

The National Bank of Commerce, of Kansas City, Missouri. vs. The Kildare Lumber Company, et al. } Chancery No. 38

Exhibit "B" to cross bill of T. J. Rogers, assignee of Citizens Bank.

MILL AND RAILROAD PROPERTY.

1. The Kildare and Linden Railroad running from Kildare, Cass county, Texas, to Linden, Cass county, Texas, including right-of-way, road bed, bridges, depots, cars and all and every equipment of said road and its franchises.

2. The Atlanta and Mount Pleasant Railroad, running from Atlanta, Cass county, Texas, towards Mount Pleasant, in Titus county, and the rights of way, road bed, bridges, depots, and cars and all equipments and the franchises.

3. Also the saw mill and planing mill outfits at Kildare and Atlanta, Texas.

Fully described in trust deed from Jefferson Lumber Company by J. H. Bemis, president, to W. R. Camp, dated July 7th, 1891, and recorded and registered in Cass county Texas, July 8th, 1891.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, et al. } No. 38, Chancery.

Exhibit "C" to Cross bill of T. J. Rogers, Assignee.

LAND CONVEYED.

Fractional Block 35 in Kildare, Texas. Also 10 acres conveyed by deed dated April 23rd, 1890, and adjoining the town of Kildare fully described in deed from J. H. Bemis, president of the Jefferson Lumber Company to W. R. Camp trustee, dated July 8th, 1891, and recorded in Cass county, July 16th, 1891.

Exhibit "D" attached to cross bill of defendant T. J. Rogers, assignee. List of debts secured by trust deed from Jefferson Lumber Company to W. R. Camp, trustee, dated July 7th and 8th, 1891.

1.	Amount due laborers	$ 5367.70
2.	National Bank of Jefferson	20760.53
3.	Linden Bank	9896.14
4.	Atlanta Bank	7348.62
5.	Erastus Jones	54471.84
6.	John M. Bemis	35738.19
7.	A. Weinstein	6069.88
8.	J. B. Alexander	45000.00
9.	Southern Pine Lumber Co.	12674.10
10.	Griggsby Bros.	29628.03
11.	Citizens Bank	9486.07
12.	Sourther National Bank of N. Y.	6000.00
13.	Sulphur Lumber Co.	9245.34
14.	First National Bank, Milton, Pa	4350.95
15.	Marshall National Bank	3500.00

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. The Kildare Lumber Company, et al.

Cross Bill of T. J. Rogers, Assignee of Citizens

Bank, Defendant.

Filed November 20th, 1893.

C. DART, Clerk,
By W. E. Singleton, Deputy.

In the United States Circuit Court, Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri, Plaintiffs.
vs.
Kildare Lumber Company, et al. Defendants.
No. 38. Chancery.

The demurrer of the defendant, the Kildare Lumber Company, to the cross bill of T. J. Rogers, assignee of the defendant, the Citizens Bank, exhibited herein against the said Kildare Lumber Company and others.

This defendant, by protestation, not confessing any or all of the matters and things in the said cross bill, to be true in such manner and form, as the same is therein set forth and alleged, doth demur to said cross bill and for cause of demurrer, showeth:

1. That it appears from said cross bill that at the time of the execution of the mortgages or trust deeds mentioned therein, by the Jefferson Lumber Company to W. R. Camp, trustee; first, that said Jefferson Lumber Company was a private corporation created and existing under and by virtue of the laws of Texas; second, that at said date the said Jefferson Lumber Company was insolvent or contemplating insolvency and wholly ceased thereafter to carry on its business; third, that said mortgages or trust deeds sought or attempted to give preference to certain particular creditors of said Jefferson Lumber Company over its other creditors; fourth, that a receiver was appointed by a court of competent jurisdiction for said Jefferson Lumber Company and the property mentioned in said mortgages was sold under order of said

Court, duly and regularly made and afterwards confirmed; fifth, that this defendant, the Kildare Lumber Company, holds the said property under and by virtue of said sale; from all of which it appears that the said mortgages or trust deeds were, and are void as to this defendant.

2. Said cross bill alleges no facts showing any personal liability of this defendant for the alleged debt due the Citizens Bank by the Jefferson Lumber Company.

3. Said cross bill does not allege any facts constituting estoppel against this defendant from availing itself of the invalidity of said mortgages.

4. It appears from said cross bill that the Jefferson Lumber Company is a proper and necessary party to said cross bill either as plaintiff or defendant.

Wherefore and for divers other good causes of demurrer appearing in the cross bill, the said defendant, the Kildare Lumber Company doth demur thereto, and hereby prays the judgment of this Court whether it shall be compelled to make any other of further answer to said cross bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

TODD & RODGERS,
Solicitors for the Defendant, Kildare Lumber Company.

We hereby certify that in our opinion the foregoing demurrer is well founded in every point of law.

TODD & RODGERS,
Solicitors for the Defendant, Kildare Lumber Company.

Chas. S. Todd, one of the solicitors for the defendant, the Kildare Lumber Company, being sworn, says, that the foregoing demurrer is not interposed for delay.

CHAS. S. TODD.

Sworn to and subscribed before me, this, the 21st day of February, A. D. 1894.

W. T. HUDGINS,
Notary Public, Bowie County, Texas.

Endorsed: United States Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. the Kildare Lumber Company, et. al.

Demurrer of Kildare Lumber Company to cross blll of T. J. Rogers, assignee of Citizens Bank.

Filed February 26th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.,	Complainant.
vs.	
Kildare Lumber Co., W. R. Camp, Geo. T. Todd, The Atlanta Bank, of Atlanta, Texas, The Citizens Bank, of Jefferson Texas, J. H. Bemis, W. B. Ward, and L. S. Schluter.	Ch. No. 38. Defendants.

The answer of the above named National Bank of Commerce, of Kansas City, Mo., to the cross bill of T. J. Rogers, as assignee of the above named Citizens Bank.

In answer to the cross bill of T. J. Rogers, Assignee of the Citizens Bank, the said National Bank of Commerce, of Kansas City, Mo., says as follows:

1, It does not know and cannot set forth as to its belief or otherwise whether the said Citizens Bank became insolvent, and by an order passed by its Board of Directors, appointed the said Rogers, assignee as in said cross bill stated, or whether the said Jefferson Lumber Company, was on July 7th, 1891, justly indebted

to said Citizens Bank in the sum of $9486.07, bearing eight per cent interest from July 1st, 1891, as in said cross bill stated.

2. It admits that on July 7th. 1891, three papers were executed by J. H. Bemis, professing to act as President of the said Jefferson Lumber Company, which papers purported to be mortgages conveying to W. R. Camp, trustee, the lands set out in Exhibits A. B. and C. attached to said cross bill; but it has reason to believe that said papers were signed and acknowledged by said Bemis without any authority from the Board of Directors of said Jefferson Lumber Company.

3. It admits that it is informed and believes that the debts mentioned in said Exhibit D. have been paid, as in said cross bill stated.

4. It admits that the District Court of Marion county, Texas, appointed H. A. O'Neal receiver, and that as such he took charge of all the property mentioned in said exhibits A. B & C. and that on may 3rd, 1892, said H. A. O'Neal and E. A. Allday, under an order of the said District Court of Marion county, Texas, sold said property, at public sale, to W. B. Chew, W. B. Ward, J. M. Bemis and Elijah Robinson for the sum of $13,000 and that said sale was confirmed by said court on the———day of June 1892; but it denies that the order of court approving said sale was in all respects such as set forth in the said cross bill. It attaches hereto a copy of said order of court approving said sale which is marked Exhibit A and makes the same a part of its answer herein.

5 It admits that the purchasers of said property conveyed the same to the said Kildare Lumber Company and that the same is now held by said company,

6 It does not know and cannot state its belief wether the order of court directing said property to be sold by said O'Neal and Allday was in terms and effect such as set forth in said cross bill.

7. It says that it is informed and believes that it is not true that a valid lien was created by said deeds of trust to said W. R. Camp, made on July 7th, 1891, on the property therein described in favor of said Citizens Bank for the sum of $9486.07. or any other sum and it denies that said Chew, Ward, Bemis and Robinson purchased or took said property, subject to any lien of said pretended deed of trust, and denies that they or any of them are estopped to deny the validity thereof, and denies that said pretended deed of trust created any lien on said property.

8 It says that it does not know and cannot set forth any belief as to the actual value of said property or as to the reason why the same sold for the sum of $13,000.

9. It has no knowledge and cannot state its belief wether the Atlanta Bank has any other security than the pretended deed of trust to W. R. Camp as aforesaid: or wether it has the personal obligation of the Kildare lumber Company, as in said cross bill stated.

10, Further answering said Cross bill, it says that at the time of the execution of the said papers by said J. H. Bemis as president of the Jefferson Lumber Company, purporting to be deeds of trust to said W. R. Camp, as in the cross bill set forth, the said Jefferson Lumber Company was largely indebted and wholly insolvent, and that the said Citizens Bank of Jefferson Texas, was at the time of the execution of said papers and ever since has been well aware of the insolvency of said Jefferson Lumber Company; that said Jefferson Lumber Company was indebted to divers and sundry persons in large amounts, besides those persons and corporations undertaken to be preferred by said papers purporting to be deeds of trust executed by said Bemis as aforesaid; that on the account of said insolvency of said Jefferson Lumber Company it could not lawfully prefer the creditors mentioned in Exhibit to said cross bill attached, if they were creditors.

It therefore submits that under the circumstances

and facts heretofore appearing the said Rogers is not entitled to the relief in said cross bill prayed, or any other relief whatever.

ELIJAH ROBINSON,
Solicitor for The National Bank of Commerce, of Kansas City, Mo., Complainant.

State of Missouri, }
County of Jackson. } C. J. White being duly sworn, says that he is Cashier of the National Bank of Commerce, of Kansas City, Mo., the complainant in the above entitled cause; that as such Cashier, he has charge of the records, accounts, bills receivable and other like papers and assets of said bank, and because of having such charge and for and on behalf of said Bank, he makes this affidavit; and he further says that so much of the foregoing answer as is not stated on information and belief is true, and that such thereof as is stated on information and belief, he believes to be true.

C. J. WHITE.

Subscribed and sworn to before me the undersigned Notary Public, within and for the County of Jackson and State of Missouri aforesaid, at my office in said County and State. In witness hereof I have hereunto subscribed my hand and affixed my Notarial seal this the 19th day of January, 1894. My commission expires January 23rd, 1896.

DENTON DUNN,
Notary Public, Jackson County, Mo.

Endorsed: United States Chy. No. 38. The National Bank of Commerce of Kansas City, Mo. vs. The Kildare Lumber Company, et al.

Answer of National Bank of Commerce, of Kansas City, Mo., to cross bill of T. J. Rogers. Filed January 22nd, 1894, C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court, for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce. of Kansas City, Mo.
vs.
The Kildare Lumber Co. et al.

On cross bill of T. J. Rogers, assignee of Citizens Bank, defendant.

Now comes T. J. Rogers, defendant in above cause and complainant in cross bill, and says:

The objection of the Kildare Lumber Company for want of proper parties to the cross bill is set down, and the cross bill is set down upon the objection for want of proper parties.

F. H. PRENDERGAST,
Solicitor for T. J. Rogers, Defendant and Complainant.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et al. Setting down cross bill on objection for want of proper parties. Filed March 14th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

The National Bank of Commerce of Kansas City, Mo.
vs.
The Kildare Lumber Company, et al
Chy. No. 38.

Amendment to answer of T. J. Rogers, who appears for the Citizens Bank, one of the defendants.

This defendant, further answering, says and suggests that in so far as complainants in their bill seek to have declarded and held for naught the trust deeds or either of them, made by the Jefferson Lumber Company to W. R. Camp, trustee, dated July 8th, 1891. That there is to complainant's bill a want of a necessary

party, defendant, to-wit: The Jefferson Lumber Company, which is a corporation created by and under the laws of Texas, and has its principal office at Jefferson, Texas, and that J. H. Bemis is its president.

This defendant prays that the above amendment be added to and taken a part of their original answer, and that it he added and made a part of section ten on page five of their original answer, and they pray as in their original answer.

T. J. ROGERS, Defendant,

By F. H. PRENDERGAST.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. the Kildare Lumber Company et al.

Amended answer of T. J. Rogers, suggesting necessary party defendant. Filed November 10th, 1893, C. Dart, Clerk, by W. E. Singleton, Deputy.

In the Circuit Court, of the United States for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, et al. } No. 38, Chancery.

To the Honorable David E. Bryant, Judge of said Court:

Now comes T. J. Rogers, complainant in cross bill and prays to be allowed to amend said cross bill.

1. To correct clerical errors in sixth paragraph of said cross bill, and show the debt due the Citizens Bank was not paid.

2. To pray for process on Jefferson Lumber Company as a defendant in the cross bill.

3. To enlarge or make the prayer for judgement more specific by praying for judgment for his

debt, interest and costs and a foreclosure of lien and for an order of sale.

This first amendment is asked to correct verbal errors which were not noticed until recently. The second amendment is asked because of the Kildare Lumber Company demurrers for want of proper parties. The third amendment is asked to make somewhat more specific what was already plead in general terms.

Wherefore he prays for leave to file his amendment on or before May 12th, 1894.

F. H. PRENDERGAST,
Solicitor for T. J. Rogers.

F. H. Prendergast on oath says the facts stated above are true. Sworn to and subscribed before me this 2nd day of May, 1894.

T. H. LANGLEY,
Notary Public, Harrison County, Texas.

In chambers May 3rd, 1894. Ordered that T. J. Rogers, assignee be allowed to file the amendment prayed for above.

DAVID E. BRYANT, Judge.

Endorsed: United States Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. the Kildare Lumber Company, et. al.

Order allowing T. J. Rogers to file amendment to cross bill. Filed May, 5th, 1894. C. Dart, Clerk; by W. E. Singleton, Deputy. Entered Rule Book, May 7th, 1894.

In the United States Circuit Court for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, et al.	Chy No. 38.

Now comes the Citizens Bank of Jefferson, Texas, one of the defendants in the above cause, and appears here now by T. J. Rogers who is the assignee of said Citizens Bank, and shows that he is entitled to

collect the debts due to the said Citizens Bank, and is entitled to all the assets of said Citizens Bank. And prays that he be allowed to appear in above cause for said Citizens Bank. And prays the court that the hearing on the injunction be continued over and set for hearing and that this defendant have leave in the meantime to file such contest or objection as they may be advised.

F. H. PRENDERGAST.
Solicitor for T. J. Rogers.

Endorsed: U. S. Chy No. 38. The National Bank of Commerce of Kansas City Mo., vs. the Kildare Lumber Company, et al. Application of T. J. Rogers to be allowed to appear.

Filed September 25th, 1893. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Court for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri. vs. The Kildare Lumber Company, et al. } Chancery No. 38

To the Hon. Judges of said Court: Comes T. J. Rogers, Assignee of the Citizens Bank, a defendant in the above cause, and complainant in cross bill filed by him in said cause on November 20th, 1893, and having obtained permission of the Judge of said court to do so files this his amendment to his cross bill and says:

1. He desires to amend said original bill by substituting the following in place of the 6th paragraph of said cross bill. "6th. This cross complainant says he is informed and believes and alleges that all and each of said debts mentioned in Exhibit "D" are paid, except that the debt due T. J. Rogers, assignee of the Citizens Bank, is not paid, and the debt due the Atlanta Bank is not paid in full."

2. This cross complainant further amends said

cross bill by amending the 17th paragraph of said cross bill by praying for process against the Jefferson Lumber Company, a corporation, to be served on J. H. Bemis, its president, who resides in Bowie County, Texas.

3. This cross complainant further amends said 17th paragraph of said cross bill by amending the prayer and pray for judgment for $9,486.07 with eight per cent. interest thereon, from July 1st, 1891, and for costs, and for a foreclosure of the mortgage lien created by the deed from Jefferson Lumber Company to W. R. Camp, trustee, on the property named therein, and that the said lien be declared superior to the lien of W. B. Ward and the lien of complainants, and the Atlanta Bank be decreed to exhaust its remedy against the Kildare Lumber Company and the Bemis Lumber Company before coming against the property set out in the said mortgage to W. R. Camp, and this cross bill prays for an order of sale to sell said property to pay his said debt, interest and costs and for general relief. Answer under oath is waived.

F. H. PRENDERGAST,
Solicitor for T. J. Rogers.

In the Circuit Court, of the United States within and for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri, vs. Kildare Lumber Company, et al. } Plaintiff. Defendants.

Answer of defendant, Kildare Lumber Company, to the cross bill of defendant T. J. Rogers.

The defendant, the Kildare Lumber Company now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections of the cross

bill of the defendant, T. J. Rogers, for answer to the same says:

1. That the cause of action set up in said cross bill, if any there be, accrued more than two years next before the filing of said cross bill herein; wherefore defendant here pleads the statutes of limitation against the alleged debt claimed by said cross bill.

2. That the deed in trust mentioned and set out in said cross bill was made and executed by the Jefferson Lumber Company, in contemplation of insolvency, and at the time of such execution, said Jefferson Lumber Company was a private corporation under the laws of Texas, and was, and is, utterly and totally insolvent, and thence, hitherto, has been unable to carry on its business; that said Jefferson Lumber Company has been judicially declared insolvent by a court of competent jurisdiction, to-wit: The District Court of Marion County, Texas, and by said Court a Receiver, to-wit: Hardy A. O'Neal was appointed to take charge of and administer the property and estate of said Jefferson Lumber Company, under the order of said Court; that said receivership and proceedings thereon were pending in said District Court of Marion County for a long time to-wit: from ..... day of July, A. D. 1891, to the ..... day of July, A. D. 1892; that neither the defendant, T. J. Rogers nor the Citizens Bank, of which he is assignee or trustee, ever appeared in said Court and set up their claim, or sought any relief, as they were in duty bound to do. That a final decree was rendered by said District Court of Marion County in said suit, and the property here in controversy was, by said Court, ordered to be sold, and was sold, and was acquired under and by virtue of said sale, by this defendant, the Kildare Lumber Company, all as alleged in said Kildare Lumber Company's answer to the plaintiffs bill in this cause, so much of which answer is here adopted and referred to. That said sale was regularly confirmed by said Court, and the title to said property

confirmed and assured to this defendant. That during the pendency of said receivership suit and proceedings in said District Court of Marion County, said Citizens Bank and T. J. Rogers silently stood by and acquiesced in said proceedings and knowingly stood by and permitted said property to be sold under said order of sale, and the sale to be confirmed without protest or objection thereto, to the detriment of the purchaser and this defendant, by reason of all of which this defendant, the Kildare Lumber Company, says said defendant, T. J. Rogers, is not entitled to recover by his cross bill herein; all of which matters and things this defendant is ready and willing to verify, maintain and prove, as this Honorable Court shall direct, and prays that it be hence dismissed with its costs in this behalf sustained.

TODD & RODGERS.
Solicitors for Defendant Kildare Lumber Company.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. The Kildare Lumber Compay, et. al, Answer of Kildare Lumber Company to cross bill of defendant, T. J. Rogers. Filed June 4th, 1894. C. Dart, Clerk, dy W. E. Singleton, Deputy.

TODD & RODGERS,
Solicitors.

In the United States Circuit Court for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.	Plaintiff
vs	
Kildare Lumber Company, et al.	Defendants.

Now comes the defendant, the Jefferson Lumber Company, and demurs to the cross bill of T. J. Rogers, assignee of the defendant, Citizens Bank, and

says:

1. That the cause of action set up in said cross bill, if any there be, accrued more than two years next before the filing of said cross bill herein, and before this defendant was made a party defendant herein, and said defendant here pleads the statutes of limitation of two years by way of demurrer and prays judgment of the court.

2. That the indebtedness alleged and cause of action set up in said cross bill, if any there be, accrued more than four years next before the filing of said cross bill herein and before this defendant was made a party. Wherefore this defendant pleads the statutes of limitation of four years by way of demurrer, and prays judgment of the court.

3. Said cross bill is wholly insufficient in law and shows no valid lien of T. J. Rogers, assignee.

TODD & RODGERS,
Solicitors for Defendant, Jefferson Lumber Company.

And for answer to said cross bill of defendant T. J. Rogers, this defendant the Jefferson Lumber Company, denies all and singular the allegations in said cross bill contained and demands strict proof:

Further answering this defendant says that the cause of action set up in said cross bill, if any there be, accrued more than two years next proceeding the fiiling of the cross bill herein, and making this defendant a party. Wherefore this defendant pleads the statutes of limitations of two years against the alleged debt claimed by said cross bill.

Further answering, defendant says that the indebtedness alleged and cause of action set up in said cross bill, if any there be, accrued more than four years next before the filing of said cross bill, and making this defendant party herein.

Wherefore this defendant pleads the statute of limitations of four years against the alleged debt claimed by said cross bill.

Further answering herein this defendant the Jefferson Lumber Company, here adopts in full the 2nd paragraph of the answer of the respondent, the Kildare Lumber Company, as part of its answer herein, as fully and specifically as if here set out.

All of which matters and things this defendant is ready and willing to verify, maintain and prove, as this Honorable Court shall direct; and prays that it may be hence dismissed with its costs in this behalf sustained.

TODD & RODGERS.
Solicitors for Defendant,
Jefferson Lumber Co.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo. vs. the Kildare Lumber Company, et al.

Answer of the Jefferson Lumber Company to the cross bill of defendant T. J. Rogers.

Filed Aug. 6th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.
vs.
Kildare Lumber Company, et al.

The replication of T. J. Rogers, one of the defendants in the above cause, and complainant in the cross bill filed by T. J. Rogers, assignee of Citizens Bank. Replying to the answer filed by the National Bank of Commerce to said cross bill. The repliant saving and reserving all advantages of exception to the manifold insufficiencies of said answer for replication thereto saith that he will aver and prove his said cross bill to be true and sufficient, and the said answer to be untrue and insufficient.

Wherefore he prays relief as in his cross bill set

forth.

F. H. PRENDERGAST,
Solicitor for T. J. Rogers, Complainant in Cross Bill.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et al.

Replication of T. J. Rogers, complainant in cross bill. Filed February 1st, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

F. H. PRENDERGAST, Attorney.

In the United States Circuit Court, for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce. of Kansas City, Mo. vs. The Kildare Lumber Co. et al.

To the Honorable Judges of Said Court:

The replication of T. J. Rogers, assignee of Citizens Bank and complainant in this cross bill to the answer of the Jefferson Lumber Company, defendant in said cross bill.

This repliant saving and reserving all advantages of exception to the manifold insufficiencies of said answer or replication thereto, saith:

That he will aver and prove his said cross bill to be true and sufficient and that the said answer is untrue and insufficient wherefore he prays relief as is in his said cross bill set forth.

R. R. TAYLOR & F. H. PRENDERGAST,
Attorneys for T. J. Rogers.

Endorsed: U. S. Chy No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company et al.

Replication of T. J. Rogers to answer of Jefferson Lumber Company Filed August 28th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Court for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri.	Plaintiff.
vs.	Chancery No. 38
The Kildare Lumber Company,	Defendant.

Now comes the defendant, the Kildare Lumber Company, and moves the court to grant said defendant leave to amend its pleadings by filing a demurrer and a plea to the jurisdiction of this court in this cause showing that this court is without jurisdiction of the parties to and subject matter of this suit.

TODD & RODGERS,
Solicitors for said Defendant.

Clerk will issue copy and precept to be served on plaintiff's counsel, J. H. Culberson, Esq.

TODD & RODGERS.

Endorsed: U. S. Chy No. 38. The National Bank of Commerce of Kansas City Mo., vs. the Kildare Lumber Company, et al.

Motion for leave to amend pleading.

Filed September 24th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the Circuit Court, of the United States within and for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Missouri,	Plaintiff.
vs.	No. 38, In Equity
Kildare Lumber Company, et al.	Defendants.

Now comes the defendant, the Kildare Lumber Company, and by leave of the Court first had and obtained, amending its pleadings hereto filed herein, in addition thereto states and shows by way of demurrer that this court hath no jurisdiction of this cause, nor of the parties thereto and subject matter thereof, for this that it appears from the allegations in plaintiff's bill

herein that this defendant is and was a citizen of the State of Texas, and that Louis S. Schluter, who is made a defendant in said bill, was and is the trustee named and appointed as such in the trust deed or mortgage sought to be foreclosed herein, and holds the legal title to the property conveyed therein; and that said Louis S. Schluter was and is a citizen of the same State with the defendant, the Kildare Lumber Company, to-wit: the State of Texas; all of which appears from the allegations of plaintiff's said bill. Wherefore the defendant, the Kildare Lumber Company, says this court hath no jurisdiction of this cause, and prays that the same be dismissed.

TODD & RODGERS,
Solicitors for said Defendant.

Chas. S. Todd, being duly sworn, says that he is of counsel for the said defendant, Kildare Lumber Company, and that the foregoing demurrer is not interposed for delay. And as such counsel, I, the said Chas. S. Todd, do hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

CHAS. S. TODD,

Sworn to and subscribed before me this 24th day of September, 1894.

C. DART, Clerk,
By W. E. Singleton, Deputy.

And further, by way of plea to the jurisdiction of this court in this cause the said defendant, the Kildare Lumber Company, states and says, that Louis S. Schluter, defendant herein, was and is the trustee named and appointed in the trust deed sought to be foreclosed herein by plaintiff, and that the said trustee, Louis S. Schluter was at the time of the execution and delivery of said trust deed, and at the time of the institution of this suit and the filing of plaintiff's bill herein, and thence hitherto hath been continuously and still is a resident and citizen of the State of Texas, and that the defendant, the Kildare Lumber Company, hath

ever been and still is a private corporation created, organized, existing and having its domicile in the State of Texas and is add ever hath been a citizen of the said State of Texas; all of which defendant is ready to verify.

TODD & ROGERS,
Solicitors for said Defendant.

Chas. S. Todd, being sworn, says on oath that he is of counsel for the Kildare Lumber Company, defendant in this cause, and that the foregoing plea to the jurisdiction of this court is true in point of fact.

CHAS. S. TODD.

Sworn to and subscribed before me this the 24th day of September, 1894.

C. DART, Clerk,
By W. E. SINGLETON, Deputy.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. the Kildare Lumber Company et al,

Demurrer and plea to the jurisdiction. Filed September 24th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

United States Circuit Court, Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, et al. } Equity No. 38.

October 1st, 1894.

On this day came the parties to this suit, by their solicitors, and thereupon came on to be heard the demurrer and plea of the defendant, the Kildare Lumber Company, to the jurisdiction of the court in this suit; and the said demurrer and plea having been heard and argued and the court being sufficiently advised, it is ordered that the said demurrer and plea be over-

ruled, to which ruling said defendant excepted.

Thereupon the hearing of the cause proceeded but the hearing not being concluded the further consideration of the cause was postponed until tomorrow.

EVIDENCE.

National Bank of Commerce vs. Kildare Lumber Co., et al. } Jefferson, Texas, U. S. Courts. Chy. No. 38.

The plaintiff and defendants or their attorneys will take notice that I will apply for a commission to take the depositions of J. H. Bemis, C. F. Bemis, W. G. Ragley and Thos. Byrne, in answer to the accompanying interrogatories.

T. J. ROGERS,

Defendant and plaintiff in Cross Bill, by F. H. Prendergast Attorney.

1st. Who owned the capital stock of the Jefferson Lumber Company, on July 7th, 1891, and what amount did each own?

2nd. What amount of said stock was owned by J. H. Bemis, C. F. Bemis, W. G. Ragley, T. Byrne and Mrs. Galloway, and what proportion of the whole amount of stock was this?

3rd. What was the whole amount of capital stock of the Jefferson Lumber Company on July the 7th, 1891?

4th. What amount of said stock did J. H. Bemis own and control on July 7th, 1891?

5th. If you do not know state what the books of Jefferson Lumber Company show?

F. H. PRENDERGAST,
Solicitor for T. J. Rogers.

Cross by Kildare Lumber Company.

1st. Cross Inty: Give a tabulated statement of the Jefferson Lumber Company stock and by whom owned on July 7th, 1891, and who owns said stock now?

W. T. ARMISTEAD,
Attorney for Defendant, Kildare Lumber Company.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo. vs. the Kildare Lumber Company, et al. Interrogatories, Cross Interrogatories: J. H. Bemis et al. Filed September 8th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the Circuit Court of the United States for the Eastern District of Texas at Jefferson.

I, C. Dart, Clerk of the Circuit Court of the United States for the Eastern District of Texas at Jefferson, do hereby certify that the foregoing and attached pages of manuscript numbered in the margin of said pages (from one to three, both inclusive,) contain a full, true and correct copy and transcript of the original interrogatories and cross interrogatories in cause No. 38, National Bank of Commerce of Kansas City, Mo. vs. the Kildare Lumber Company, et al., all of which appear from the records of said Court now in office.

In testimony whereof, I have hereunto set my [SEAL] hand and affixed the seal of the Circuit Court of the United States of America, for the Eastern District of Texas at Jefferson, this 10th day of September, A. D., 1894.

C. DART,

Clerk, U. S. Circuit Court, Eastern District of Texas at Jefferson, by W. E. Singleton, Deputy.

In U. S. Circuit Court at Jefferson.

United States of America, }
Eastern District of Texas. }

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To any Judge or Clerk of a Court of record having a seal, or any Notary Public of Marion County, State of Texas, GREETING:

KNOW YE, That we in confidence of your prudence and fidelity, have appointed you, or either of you, and by these presents do give unto you full power and authority diligently to examine W. G. RAGLEY, upon

certain interrogatories to be propounded to him in a cause wherein The National Bank of Commerce, of Kansas City, Mo., is plaintiff and the Kildare Lumber Company is defendant, now pending in Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, and therefore we command that you, at certain days and places to be appointed by you for that purpose, cause the said witness to come before you, and then and there examine him upon the said interrogatories (copies whereof are hereto annexed) on his corporal oath first taken before you upon the HOLY EVANGELISTS, or in such other solemn manner as is and may be authorized by law; and that you do take these answers of the witness to such interrogatories, and reduce the same to writing, which shall be signed and sworn to by said witness; and you shall certify, under your hand and seal, that the same was signed and sworn to by the said witness, before you, and shall seal them up in an envelope, with the interrogatories and this commission, with your name across the seal, and indorse on the envelope the names of the parties to the suit and the name of the witness, and direct the package to the Clerk of the Circuit Court of the United States, for the Eastern District of Texas, Jefferson, Texas, if sent by mail, the postmaster, or his deputy mailing the same, shall indorse thereon that he received them from the hands of the officer before whom they were taken.

Witness, the Honorable, Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of the Circuit Court [SEAL.] in and for the Eastern District of Texas at Jefferson, in said District, this, 10th day of September, A. D. 1894, and of the year of Indedependence, the 118 year.

C. DART,
Clerk U. S. Circuit Court, Eastern
District of Texas, at Jefferson.
By W. E. SINGLETON, Deputy.

In U. S. Circuit Court, Eastern District of Texas.

National Bank of Commerce
vs. Chancery No. 38.
Kildare Lumber Co., et. al.

Answers and depositions of W. G. Ragley, a resident of Jefferson, Marion County, Texas, to the accompanying interrogatories propounded to him in the above entitled cause, taken before W. F. Jones, Clerk of the County Court of Marion County, Texas, in accordance with the accompanying Commission.

Answers of the witness W. G. Ragley:

1st. Inty I don't know who owned the stock of the Jefferson Lumber Company on July 7th, 1891.

2nd. Inty I don't know what amount of stock J. H. Bemis, C. F. Bemis, Thomas Byrne and Mrs. Galoway own. W. G. Ragley owns one share.

3rd Inty. I do not know.

4th Inty. I do not know.

5th Inty. I do not know what the books of the Jefferson Lumber Company show.

Cross interrogatories by Kildare Lumber Company:

1st. Cross Inty. I am not able to give said tabulated statement, and don't know who owned it on July 7th, 1891, and don't know who owns said stock now.

W. G. Ragley.

Sworn to and subscribed before me, this. September 14th, 1894.

W. F. Jones, Clerk.

The State of Texas,
County of Marion.

I, W. F. Jones, Clerk of the County Court in and for Marion County, Texas, do hereby certify that the foregoing answers of W. G. Ragley, the witness before named, were made before me, and were sworn to and subscribed before me, on the 14th day of September, 1894.

W. F. Jones,
County Clerk, Marion County, Texas.

Endorsed: U. S. Chy. No. 38. The National

Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et al.

Commission: Issued 10th day of September, A. D. 1894. C. Dart, Clerk, by W. E. Singleton, Deputy. Filed September 17th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

Jefferson, Texas, September 8th, 1893. In U. S. Courts. Chancery No. 38.

National Bank of Commerce.
vs.
Kildare Lumber Company et al.

The plaintiff and the defendants or their attorneys will take notice that I will apply for a commission to take the depositions of J. H. Bemis, C. F. Bemis, W. G. Ragley and Thos. Byrne. In answer to the accompanying interrogatories.

T. J. ROGERS,
Defendant and Plaintiff in Cross Bill,
By F. H. Prendergast, Attorney.

1st. Who owned the capital stock of the Jefferson Lumber Company on July 7th, 1891, and what did each own?

2nd. What amount of said stock was owned by J. H. Bemis, C. F. Bemis, W. G. Ragley, Thos. Byrne and Mrs. Galloway, and what proportion of the whole amount of stock was this?

3rd. What was the whole amount of the capital stock of the Jefferson Lumber Company on July 7th, 1891?

4th. If you do not know, state what the books of the Jefferson Lumber Company show?

Cross by Kildare Lumber Company.

1st. Cross Int. Give a tabulated statement of the Jefferson Lumber Company stock, and by whom owned on July 7th, 1891, and who owns said stock now?

W. T. ARMISTEAD,
Attorney for Defendant, Kildare Lumber Company.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et al. Interrogatories, Cross Interrogatories, J. H. Bemis, et al. Filed September 8th, A. D , 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson.

I, C. Dart, Clerk of the Circuit Court of the United States for the Eastern District of Texas at Jefferson, do hereby certify that the foregoing and attached pages of manuscript numbered in the margin of said pages (from one to three), both inclusive, contain a full, true and correct copy and transcript of the original and cross interrogatories in cause Chancery No 38, The National Bank of Commerce of Kansas City, Mo., vs. the Kildare Lumber Company, et al. all of which appear from the records of said Court now in office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court [SEAL] of the United States of America for the Eastern District of Texas, in said city of Jefferson this 10th day of September, A. D., 1894.

C. DART,
Clerk, U. S. Circuit Court,
Eastern District of Texas, at Jefferson.
By W. E. Singleton, Deputy.

United States of America, } In U. S. Circuit Court
Eastern District of Texas. } at Jefferson.

THE PRESIDENT OF THE UNITED STATES OF AMERICA.

To any Judge or Clerk of a Court of record having a seal or any Notary public of Bowie County, State of Texas,—GREETING:

KNOW YE, That we, in confidence of your prudence and fidelity, have appointed you or either of you and by these presents do give unto you full power and authority diligently to examine J. H. Bemis, C. F. Bemis and Thos. Byrne, all of whom reside in the

county of Bowie at the city of Texarkana, State of Texas, upon certain interrogatories to be propounded to them in a cause wherein the National Bank of Commerce of Kansas City, Mo., is plaintiff and the Kildare Lumber Company et al are defendants now pending in the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit of Texas; and therefore we cammand, that you, at certain days and places to be appointed by you, for that purpose, cause the said witnesses to come before you, and then and there examine them upon the said interrogatories and cross interrogatories (copies whereof are hereto annexed) on their corporal oath first taken before you upon the Holy Evangelist or in such other solemn manner as is and may be authorized by law; and that you do take the answers of the witnesses to such interrogatories and reduce the same to writing, which shall be signed and sworn to by said witnesses and you shall certify under your hand and seal that the same was signed and sworn to by the said witnesses and shall seal them up in an envelope, with the interrogatories and this commission, with your name across the seal, and indorse on the envelope the names of the witnesses, and direct the package to the Clerk of the Court of the United States for the Eastern District of Texas at Jefferson, Texas; if sent by mail, the postmaster or his deputy, mailing the same, shall indorse thereon that he received them from the hands of the officers before whom they were taken.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of the Circuit Court in [SEAL.] and for the Eastert District of Texas at Jefferson, in said District, this 10th day of September, A. D., 1894, and of the Independence of The United States 118. C. DART,

Clerk, U. S. Circuit Court, Eastern District of Texas, at Jefferson, By W E. Singleton, Deputy.

Suit pending in the U. S. Circuit Court of Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo. vs. Kildare Lumber Company, } No. 38.

Answer and depositions of J. H. Bemis, Thos. Byrne and C. F. Bemis, residents of the County of Bowie, in the State of Texas to the accompanying interrogatories propounded to them in the above entitled cause taken before W. E. Estes, Notary Public in and for Bowie County, Texas, in accordance with the accompanying commission:

Answer of the witness, J. H. Bemis:

To the first interrogatory he answers: The following named persons owned the capital stock of the Jefferson Lumber Company on July 6th, 1891, and the following amounts were owned by each of the following persons, to-wit:

Galloway's estate owned	282	22-100 shares.
C. H. Bemis owned	80	
W. N. Bemis owned	66	
C. F. Bemis owned	25	
J. H. Bemis owned	964	28-100
Thomas Byrne owned	10	
W. G. Ragley owned	10	
Total	1437	50-100 shares.

Shares $100.00 each—total $143,750.

To the second interrogatory he answers: This interrogatory is fully answered in my answer to the first interrogatory to which reference is here made.

To the third interrogatory he answers: The whole amount of said capital stock was 1437,50-100 shares at $100 each amounting to $143,750, as shown in my answer to first interrogatory.

To the fourth interrogatory he answers: On the 7th, day of July, 1891, J. H. Bemis owned and con-

trolled 964 28-100 shares of stock in said Lumber Company.

To the fifth interrogatory, he answers: The books of the Jefferson Lumber Company show precisely the same as I have testified in my answer to interrogatories one, two, three and four.

J. H. BEMIS.

To the first cross interrogatory, he answers: The tabulated statement in answer to direct interrogatory No. 1, fully shows ownership of said stock.

J. H. BEMIS.

Answer to the witness Thomas Byrne.

The books of the Jefferson Lumber Company show that the stock of said company on the 7th of July, 1891 was owned as follows:

The Estate of Galloway owned	286	22-100	Shares
C. H. Bemis "	80		"
W. N. Bemis "	66		"
C. F. Bemis "	25		"
J. H. Bemis "	964	28-100	"
Thomas Byrne "	10		"
W. G. Ragley "	16		"
Total	1437	50-100	"

Shares $100.00 each.

To the second interrogatory, he answers: I have answered this in my previous answer to Interrogatory No. 1.

To the third interrogatory, he answers: The amount of said capital stock, as I have before stated was 1437 50-100 shares at $100 each share.

To the fourth interrogatory, he answers: The books of the Jefferson Lumber Company show that on the 7th day of July, 1891, J. H. Bemis owned and controlled 964 28-100 shares in said company, as shown in tabulated statement in my answers to interrogatory First.

To the fifth interrogatory, he answers: I have tes-

tified just as the books show and refer to my answer to direct interrogatories.

THOMAS BYRNE.

To the first cross interrogatory, he answers: I have fully shown the ownership of the capital stock in my answer to direct interrogatory No. 1.

THOMAS BYRNE.

Answer of the Witness C. F. Bemis:

To the first interrogatory, he answers: The books of the Jefferson Lumber Company show that on the 7th day of July, 1891, the capital stock of said company was owned as follows:

The Estate of Galloway owned	282	22-100	Shares
C. H. Bemis owned	80		"
W. N. Bemis owned	66		"
C. F. Bemis owned	25		"
J. H. Bemis owned	964	28-100	"
Thomas Byrne owned	10		"
W. G. Ragley owned	10		"
Total	1437	50-100	Shares

To the second interrogatory he answers: I have given a full statement of the ownership of said stock in my answer to interrogatory No. 1.

To the third interrogatory he answers: The capital stock of said company was 1437 1-2 shares which at $100.00 per share amount to $143,750.

To the fourth interrogatory, he answers: It appears from the books of the company that on the 7th day of July, 1891, J. H. Bemis owned and controlled 964 28-100 shares of the capital stock of the Jefferson Lumber Company.

To the fifth interrogatory, he answers: I have testified just as the books show. I refer to my answer to direct interrogatory No. 1.

C. F. BEMIS.

To the first cross interrogatory, he answers: The tabulated statement in answer to direct interrogatory

No. 1, shows the ownerwship of the shares of the Jefferson Lumber Company at the date named, I refer to this answer.

C. F. BEMIS.

The State of Texas }
County of Bowie. }

I. W. E. Estes, a Notary Public in and for Bowie County, Texas, do hereby certify that the foregoing answers of J. H. Bemis, Thomas Byrne and C. F. Bemis, the witnesses before named, were made before me and were sworn to and subscribed before me on the 14th day of September A. D. 1894, by each of said witnesses.

(SEAL) Given under my hand and official seal, this the 14th day of September A. D. 1894.

W. E. ESTES.

Notary Public of Bowie County Texas.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. the Kildare Lumber Company et al.

Commission: Issued 10th day of September A. D. 1894, C. Dart. Clerk, by W. E. Singleton, Deputy.

Filed September 17th, A. D. 1894, C. Dart, Clerk, by W. E. Singleton, Deputy.

In the Circuit Court of the United States in and for the Eastern district of Texas, holding Session at Jefferson.

The National Bank of Commerce. of Kansas City, Mo.
vs.
The Kildare Lumber Co. et al.

Testimony taken for and in behalf of the piaintiff and complainant in the above styled cause, before Lewis S. Schluter commissioner appointed by the court, at his office in the city of Jefferson, Texas, on the 10th day of August 1894, after due notice to all

parties interested in said cause, which said testimony is as follows, to wit:

In the Circuit Court of the United States within and for the eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.
vs.
Kildare Lumber Company, et al.

Mr. J. H. Bemis, sworn:

Q. Where do you reside?

A. Texarkana, Texas.

Q. Where in 1891?

A. Jefferson Texas.

Q. Are you acquainted with the Jefferson Lumber Company, and was it a coporation?

A. I was. It was a private corporation.

Q. Where was its place of business?

A. Jefferson Texas.

Q. Where was it property located?

A. Principally in Cass County, Texas.

Q Who was the officers of that Company?

A. I was President.

Q. Who were the directors?

A. I do not just now recollect.

Q. Try and see if you cannot recall some of them?

A. I think they were Thos. Byrnes, W. G. Ragley, C. F. Bemis and myself were directors in 1891

Q. When was the Company organized?

A. I do not remember but I think perhaps it was organized in 1886 or 1887.

Q. What was the business of that Company?

A. Manufacturing Lumber.

Q. Do you remember the time the deed of trust was made to W. R. Camp?

A. Yes. I cannot fix the exact date, but I think it was on the 7th day of July, 1891. The paper will show that for itself.

Q. Have you a copy of the paper?

A. No, sir.

Q. Prior to that time, did you have regular meetings of the Company?

A. No.

Q. Who kept the books; did you have a secretary and treasurer?

A. Mr. Byrne kept the books. The offices were all filled.

Q. And you executed this deed of trust on the 7th of July, 1891?

A. Yes, along during the first part of July. I presume that is the correct date.

Q. How long before the execution of the deed of trust had your directors held a meeting?

A. Well, along in the early part of the year, perhaps on May 1st; cannot fix the date, the exact date, from memory.

Q. Was that deed of trust executed by you as president of the Jefferson Lumber Company?

A. Yes.

Q. Was there any meeting of the directors of the company authorizing the execution of that deed of trust?

A. No, I do not think I consulted with any of the interested parties.

Q. There was officers at that time?

A. Yes.

Q. What property did that deed of trust convey?

A. All of the Company's real estate, its mills and railroads, and all property of that description; in fact everything connected with the manufacture of lumber.

Q. Was that made to secure the payment of all the debts or liabilities of the Company?

A. No.

Q. What was the amount of the liabilities of the Company at that date?

A. I could not approximate it all.

Q. Was it not over $500,000?

A. I do not think it was anything like that sum. I would not undertake to fix the amount, however, for I do not remember.

Q. Was the concern up to that time able to go ahead with its business?

A. Yes, it was running up to that time. It stopped when the deed of trust was made.

Q. What was the property owned by the Company at that time; what did it consist of?

A. I can not tell. It owned real estate, mills, railroads and other things pertaining thereto.

Q. Could you estimate the value of the property at that time?

A. Yes, as it stood on the books of the Company, to be $250.000.00 or $300,000.00 mills, lands railroads, etc. That, you will understand, is,of course,as the value appeared on the books of the Company.

Q. Was the Company able to run after that deed of trust was made?

A. Well, I do not know. I cannot answer that I will say that they did not run.

Q. Was it solvent or insolvent?

A. I suppose it would be considered insolvent.

Q. A receiver was appointed and the property sold?

A. Yes.

Q. What did it sell for?

A. The property was sold for $13,000.00, subject to the deed of trust, which amounted to about $250,-000.00

Q. You could not approximate the amount of the liabilities of the Company?

A. No, I could not. I have not given it any thought.

Q. Is it not a fact that there are a good many outstanding debts againsts the Company now?

A. There is some indebtedness but cannot state

the amount.

Q. Do you know that the Master in Chancery's reports shows about $500,000.00 indebtedness filed with them?

A. I do not think that it shows any such amount.

Q. Who was the book-keeper of the concern, the Jefferson Lumber Company?

A. Mr Thomas Byrne.

CROSS EXAMINATION.

Q. Did you state who were the Directors?

A. The Directors in 1891, as I remember, were Thomas Byrne, W. G. Ragley, and probably Charlie and Will Bemis, and possibly Clem Galloway.

Q. Where did the Directors of the Jefferson Lumber Company live at the time the trust deed was made to W. R. Camp?

A. In Jefferson, I think, but Will probably claimed residence in Kansas City. Galloway probably claimed Kildare as his residence.

Q. Did the Directors know of this trust deed being made?

A. I suppose they knew of it afterwards.

Q. How many of them was consulted at the time it was made?

A. None.

Q. How long after did they learn that the deed of trust had heen made?

A. I could not say.

Q. Did they not know soon thereafter it had been made?

A. I could not answer that.

Q. Mr. Byrne was Secretary was he not, and did not his salary stop?

A. Mr. Byrne was Secretary. I do not know that his salary stopped for that matter.

Q. Was he employed at any time by the Jefferson Lumber Company after the 7th of July, 1891?

A. I think that he was appointed book-keeper by

the Receiver of the Jefferson Lumber Company. He knew the Jefferson Lumber Company was in the hands of a Receiver.

Q. Do you know whether Charlie and Will Bemis knew it was made?

A. No, I do not know when they knew it.

Q. Was not their home at yours at that time?

A. Yes. I do not know whether W. N. Bemis was here at that time—think probably he was at Kansas City.

Q. What was your impression about their knowing of the deed of trust?

A. Well, I only know that I made it, and whether they knew it or not, I do not know. Presumably they knew it.

Q. At what time?

A. I would not fix a time, but they probably knew it soon after the trust deed had been executed. It was a fact of notoriety that the Jefferson Lumber Company had failed.

Q. Do you know of any Director who was ignorant of it for nearly a month?

A. I do not know. I suppose that they all knew it soon after its being made.

Q. Was there any steps taken to set it aside up to this date, on the ground that it was not made with authority?

A. None that I know of, except in this present suit.

Q. Were the beneficiaries in that deed of trust all bona fide creditors of the Jefferson Lumber Company?

A. I think they were.

Q. I will ask you about the Citizens Bank claim?

A. Well, I think it was a bona fide debt as nearly as any other.

Q. The amount named therein is the correct amount due?

A. I do not know. I am not sure that I was informed at that time whether it was correct or not. I

suppose I made the preference from memory, from the impression that I had.

Q. What information had you as to what amount you owed to the bank?

A. I do not remember now excepting that I must have known from the books of the company. I think the Citizens Bank claimed more than the amount named in the deed of trust. I think there was an error against the bank that was discovered afterwards, which increased the amount due the bank. I might have known, and may have made this preference to cover what I understood the amount to be. I have no distinct recollection of the matter however. My impression is that the actual amount was over the amount preferred.

RE-DIRECT EXAMINATION.

By J. H. Culberson, Attorney.

Q. This claim of the National Bank of Commerce was not embraced in the deed of trust?

A. No, they were not preferred creditors.

J. H. BEMIS.

Sworn to and subscribed before me this 10th day of August, 1894.

L. S. SCHLUTER,
Examiner and Commissioner.

Thomas Byrne, sworn:

Q. Mr. Byrne, what position did you hold with the Jefferson Lumber Company?

A. I was book-keeper.

Q. At the time it went into the hands of a receiver?

A. I was book-keeper right along. I went with them on the first of August 1888.

Q. Have you any idea what the assets of the company were at that time?

A. I could not tell now. I could tell by looking ing at the books.

Q. Were they $500,000.00?

A. No, I am sure they were not anything like that

amount.

Q. Was it $300,000.00?

A. I cannot recall, and would not like to give a positive answer.

Q. Were you ever in a meeting of the board of directors of that company?

A. Yes.

Q. Who were the directors?

A. J. H. Bemis, C. N. Bemis, W. G. Wagley and I think W. N. Bemis, but I am not positive, and myself.

Q. You were a director yourself?

A. Yes, I was Secretary and Treasurer.

Q. Was there any meeting of the Company held prior to the making of this deed of trust to W. R. Camp, authorizing its execution?

A. No sir. There was a general meeting of the company, but I do not know that anything was done authorizing the making of a deed of trust.

Q. How did the assets and liabilities compare? Did the company owe more money than it could pay?

A. Yes, or they would not have given the deed of trust. Of course I cannot tell about the actual amount now from memory. They never done any business after that deed of trust was executed. They went into the hands of a receiver.

Q. How long a time elapsed between the execution of the trust deed, and the passage of the corporation into the hands of a receiver?

A. I could not recall that, but it was only a few days.

Q. It never has done any business since it went into the hands of a receiver?

A. Not as the Jefferson Lumber Company.

Q. That property was all sold out by the receiver?

A. Yes.

Q. Do you know what it brought at the sale?

A. Well my recollection is that it brought $13.-

000.00.

Q. What would you say, as a book-keeper of that concern, was it solvent or insolvent on the date of the execution of that deed of trust.

A. I am not prepared to answer that. They were not able to meet their obligations, or they would not have made the deed of trust, I am satisfied they were insolvent.

Q. Are there a good many outstanding debts against the company now unsettled?

A. I have not the least idea.

Q. $13,000,00 would not pay much of the liabilities would it?

A. I did not think it would.

Q. Then you say there was no meeting of the board of directors authorizing the execution of this deed of trust to W. R. Camp?

A. No, not that I know of.

Cross Examination by the Attorney, F. H. Prendergast, for the Defendant, T. J. Rogers:

Q. Was there any complaint made to the directors about this deed of trust having been made?

A. No, not through me or to me.

Q. Is it not a fact that the directors, the stockholders, left the management entirerely to J. H. Bemis?

A. I do not know how to answer that question. If you say that he had the management of the business, I would say, yes.

Q. The directors left the management to him exclusively?

A. Yes.

Q. Did they require reports from him?

A. I do not know. I was not a director long enough, and I did not examine the records of the previous meeting to inform myself.

Q. Mr Bemis had control of the business of the Jefferson Lumber Company almost entirely?

A. Yes.

Q. There was no clash of authority between him and any one else?

A. Not that I Know of.

Q. Did you know of the indebtedness of the Citizens Bank. Did they owe as much as the amount named?

A Well, I had the accounts on my books, and the matter came up between Mr Rogers, as assignee and myself, and we found one piece of the East Line Lumber Company paper that we did have in the account. It made the account greater than the amount named in the trust deed. I made the correction afterwards on the books.

THOMAS BYRNE.

Sworn to and subscribed before me this 10th day of August 1894.

L. S. Schluter,
Examiner and Commissioner.

T. J. Rogers, sworn:

Examined by J. H. Culberson, attorney for plaintiff

Q. What position did you hold with the Jefferson Lumber Company at the time the trust deed was made July 7th, 1891.

A. I had no connection with the company.

Q. Were you a creditor of the Jefferson Lumber Company?

A. No.

Q. Was the Citizens Bank, through you?

A. Yes. I was the assignee.

Q. You were not a director?

A. No, nor a stockholder.

Q. Do you remember this deed of trust that was made by the Jefferson Lumber Company to W. R. Camp?

A I remember having seen a record of it at the court house.

Q At that date was the Jefferson Lumber Company solvent or insolvent?

A. I could not say. They did not meet their obligations.

Q. Did they quit business?

A. Yes, they went into the hands of a receiver.

Q. Do you know of any outstanding obligations against the Company?

A. I hold one for the Citizens Bank. That is all I know of, personally.

CROSS EXAMINED.

By F. H. Prendergast, Attorney for Defendant, T. J. Rogers.

Q. You were appointed assignee of the Citizens Bank after the deed of trust was made?

A. Yes, July 21st, 1891, by a resolution of the board of directors; the trust deed was made, I believe, on July 7th.

Q. Did they owe some $2,000.00 or $3,000.00 more than claimed in the deed of trust?

A. Yes.

T. J. ROGERS.

Sworn to and subscribed to before me this 10th day of August, 1894.

L. S. SCHLUTER,
Examiner and Commissioner.

State of Texas, }
Marion County. }

I, Lewis S. Schluter, Commissioner appointed in the above styled cause, do hereby certify that the above and foregoing answers and depositions of the witnesses J. H. Bemis, Thos. Byrne and T. J. Rogers were made and taken before me and that the same was reduced to writing, and that the same was signed and sworn to by the said witnesses, respectively, before me.

In testimony whereof I hereto set my hand this the 20th day of September, 1890.

L. S. SCHLUTER,
Commissioner.

The State of Texas, }
County of Cass. }

KNOW ALL MEN BY THESE PRESENTS, That whereas, on the 21st day of January, 1892, we, H. A. O'Neal and E. A. Allday, were appointed commissioners by the District Court of Marion County, Texas, in a certain suit pending in said Court, wherein the Galveston National Bank is plaintiff. and the Jefferson Lumber Company defendant, said suit being numbered 5009, to sell the property of the Jefferson Lumber Company; and whereas, in pursuance of said order, we, the said commissioners, did, on the 3rd day of May, A. D., 1892, after giving due notice of the sale as required in said order appointing us Commissioners as aforesaid, offer said property hereinafter mentioned for sale to the highest bidder for cash, in front of the Court House door, in the City of Jefferson, Marion County, Texas, within the hours prescribed by law for public sale, and knocked the same off to W. B. Chew, W. B. Ward, John M. Bemis and Elijah Robinson, for the sum of Thirteen thousand dollars, they being the highest and best bidders therefor; and whereas, we the said Commissioners, did, on the 21st day of June, A. D., 1892, report said sale to the District Court of Marion County, Texas; and whereas, said sale was approved by said District Court and we ordered to make a deed to the purchasers of said property; now, therefore, in consideration of the premises and the said sum of Thirteen thousand dollars, to us in hand paid, the receipt whereof is hereby acknowledged, we, the said H. A. O'Neal and E. A. Allday, Commissioners as aforesaid, by virtue of the authority vested in us as such commissioners, hereby grant, bargain, sell and convey to the said W. B. Chew, John M. Bemis, Elijah Robinson and W. B. Ward, their heirs and assigns, all the right, title and interest and claim which the said Jefferson Lumber Company had in and to the said property sold as aforesaid at the time of said sale, said property described

as follows: * * * It being understood that the above and foregoing property herein conveyed and transferred is sold under the order of the District Court of Marion County, Texas, subject to a deed of trust executed and delivered by J. H. Bemis, President of the Jefferson Lumber Company to W. R. Camp, trustee, July 7th, 1892, and duly recorded in County Clerk's office, Cass County, Texas, in book D of mortgages, pages 199 to 215 inclusive.

Witness our hands, this the 8th of July, A. D., 1892.

HARDY A. O'NEAL & E. A. ALLDAY,
Commissioners.

The State of Texas, }
County of Cass. } Before me, R. M. Blaydes, Notary Public. in and for Cass County, Texas, this day personally appeared H. A. O'Neal and E. A. Allday, Commissioners to me well known to me to be the persons who subscribed the foregoing instrument and acknowledged to me that they executed the same for the uses, purposes and consideration therein contained.

[SEAL] Given under my hand and seal of office, this 8th day of July, A. D.. 1892.

R. M. BLAYDES,
Notary Public, Cass County, Texas.

Filed for record, December 10th, 1892, at 2 o'clock, p. m., duly recorded December 14th, 1892, at 10 o'clock, a. m.

J. K. ODEN,
County Clerk.

The State of Texas, }
County of Cass. } I, J. K. Oden, Clerk of the County Court of Cass County, Texas, do hereby certify that the foregoing is a true and correct copy of the main body of the original instrument, as the same appears of record in my office, in deed book R, 2, pages 356, 357 and 363.

Given under my hand and the seal of the said Court at office, in Linden, this 1st day of October, 1894.

J. K. ODEN, *Clerk, Cass County, Texas.*

Deed. H. A. O'Neal and E. A. Allday to W. B. Ward, et al.

Attached to the evidence of T. J. Rogers, plaintiff in cross bill.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. the Kildare Lumber Company, et. al.

Testimony of J. H. Bemis, Thos. Byrne and T. J. Rogers, taken before Lewis S. Schluter, on behalf of the complainant in the above styled suit. Filed September 25th, 1894. C. Dart, Clerk; by W. E. Singleton, Deputy.

In the Circuit Court of the United States within and for the Eastern District of Texas, at Jefferson.

The National Bank of Commerce of Kansas City, Mo.,	Complainant.
vs.	
The Kildare Lumber Company, W. R. Camp, George T. Todd, The Atlanta Bank, of Atlanta, Texas, Citizens Bank of Jefferson, Texas, J. H. Bemis, W. B. Ward and Louis S. Schluter.	Equity No. 38. Defendants.

To the above named Defendants:

You are hereby notified, that depositions of witnesses C. J. White, H. C. Schwitzgebel, W. A. Rule and Elijah Robinson, be read in evidence on the trial of the above entitled cause, on the part of the said complainant, will be taken at the law office of Elijah Robinson, room 24, Wales building, corner of Sixth and Delaware streets, in the City of Kansas City, County of Jackson,

State of Missouri, on the 20th day of August, 1894, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, and that the taking of said depositions, if not completed on that day, will be continued from day to day at the same place and between the same hours until completed. All of said above named witnesses reside more than one hundred miles from the place of holding said court and beyond its jurisdiction.

ELIJAH ROBINSON,
Solicitor for Complainant.

We hereby accept service of the within notice, waiving time and copy and agree that the deposition and testimony of the within named witnesses may be taken as stated in said notice at the office of Elijah Robinson in Kansas City, Mo., on August 20th, 1894, and as provided in said notice. And it is further agreed that the complainant shall have until the 25th of August to complete its testimony. August 11th, 1894.

W. T. ARMISTEAD,
Attorney for Kildare Lumber Co.
F. H. PRENDERGAST,
Attorney for T. J. Rogers, Assignee.
ATLANTA BANK,
By L. S. Schluter, Attorney.

Deposition of witnesses produced, sworn and examined at the office of Elijah Robinson, corner of Sixth and Delaware streets, Kansas City, Jackson County, Mo., on the 20th day of August, 1894, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day in a case pending in the Circuit Court of the United States within and for the Eastern District of Texas, at Jefferson, wherein the National Bank of Commerce, of Kansas City, Mo., is complainant, and the Kildare Lumber Company, W. R. Camp, Geo. T. Todd, The Atlanta Bank, of Atlanta, Texas, The Citizens Bank of Jefferson, Texas, J. H. Bemis, W. B. Ward and L. S. Schluter, are

defendants, on the part of the complainant.

Judge Elijah Robinson appeared for the complainants, and F. H. Prendergast, Esq., appeared for the defendants.

F. E. Marshall, being duly sworn on his oath deposes and says:

Direct examination, by Elijah Robinson.

Q. Your name is F. E. Marshall?

A. Yes sir.

Q. You live at Kansas City?

A. Yes sir.

Q. What connection have you with the National Bank of Commerce of this city?

A. Vice-President.

Q. Were you Vice-President of the National Bank of Commerce in July, 1892?

A. Yes sir.

Q. (Handing witness notes.) Have you seen these notes before, Mr. Marshall?

A. Yes sir.

Q. State the date and amount of that note.

A. The date is July 13th, 1894, given for $10,049.59.

Q. To whom is it made payable?

A. Elijah Robinson or bearer.

Q. By whom is it executed?

A. Kildare Lumber Company by W. B. Ward, President.

Q. What indorsement, if any, is there on it?

A. There is an indorsement of $791.20 as a credit.

Q. What is the language of the indorsement?

A. This note is reduced by 40 per cent, on $1978.03, being amount Southern Pine Lumber Company accepted paid.

Q. What other indorsement?

A. Well, as a credit none, as it is indorsed over by you.

Q. State what the indorsement is?

A. Without recourse, Elijah Robinson.

Q. When did that note mature?

A. January 16th, 1893.

Q. What is the number of it?

A. 42451.

Q. Whose property is it?

A. National Bank of Commerce.

Q. Do you know the hand writing of the indorsement on the back?

A. Yes sir.

Q. Whose is it?

A. Elijah Robinson.

Q State if you know, wether or not the note was indorsed and transferred by Elijah Robinson to the National Bank of Commerce of Kansas City?

A. It was, yes sir.

Q. (Handing witness note) Now, look at that note. Give the date and amount of that note and by whom made and to whom payable, the number and date of maturity?

A. This note is dated July 13th 1892, payable twelve months after date, to Elijah Robinson or bearer for $10.049,59, signed by the Kildare Lumber Company. W. B. Ward, president. The note is signed over without recourse by Elijah Robinson.

Q. Whose property is it?

A. And the property of the National Bank of Commerce. The number of the Note is 42452.

Q. (Handing the witness note), Take this note and give the date, the amount, by whom executed, to whom payable, the number, date of maturity and indorsement?

A. The note is dated July 13th, 1892, given for $10,049,60, payable eighteen months after date to Elijah Robinson or bearer, signed Kildare Lumber Company, W. B. Ward President. Indorsed, without recourse by Elijah Robinson. The property of the National Bank of Commerce. The number of the

note is 42453.

Q. Mr. Marshall, do you know the date when these notes were indorsed and transferred to the bank, or about the time?

A. Well, I couldn't give the date.

Q. Well, how is it with reference to the date of the notes themselves. How soon after?

A. Well, my impression is it was a short time after the date of the notes.

Q. Can you state positively wether it was within three months from the date of the notes?

A. Well, I should say it was, yes sir.

Q. And the National Bank of Commerce of this City has or not been the owner and holder of those notes ever since?

A. Yes sir.

Cross Examination, By F. H. Prendergast:

Q. Did the National Bank of commerce have any interest in those notes prior to the transfer? Any interest in them at the time they were taken?

A. Well, we received them from Judge Robinson. I never saw them before he brought them there.

Q. These notes as I understand, were taken bi Judge Robinson in some character of a settlement o the Jefferson Lumber Company business?

A. My understanding was this matter was in Judge Robinson's hands before I came into the bank. My understanding was they were taken by Judge Robinson in settlement of some property that he and some other people of his associates brought in.

Q. What consideration did the Bank give to Judge Robinson for the notes at the time they were transferred?

A. Well now, that I can't say.

Q. Well, is it not a fact that the property in the notes belonged to the Bank of Commerce prior to their transfer by Judge Robinson?

A. This property that was foreclosed?

Q. No sir, the ownership of these notes.

A. I will just say that if the Bank was the owner of the property for which these notes were given, I don't know it.

Q. Well, that is not exactly an answer to the question. The question is, didn't the Bank own these notes prior to the transfer by Judge Robinson to the Bank prior to this indorsement, which you say was within three months?

A. No sir. They didn't own the notes until after Judge Robinson indorsed them over to it. They were not on the books at all.

Q. What consideration did the Bank pay to Judge Robinson for the notes?

A. Well, I say I can't tell you.

Q. What officer of your Bank can give that?

A Well, I am not posted as to that either.

Q. Is there an officer in your Bank that can give that?

A. That I don't know.

Q. What office do you hold?

A. Vice-President.

Q. And you can't say whether there is any officer in the Bank that can give that information or not?

A. No sir.

Q. Well, your books show the consideration paid to Judge Robinson for these notes?

A. Probably they will. I have never made any entries myself regarding it.

A. Is it a part of your business to look after these things?

A. I am not the book-keeper.

Well, it is your business to see that the books are correct?

A. Sometimes. yes, I look them up, but that single transaction I have never looked up.

Q. Judge Robinson visited Jefferson, Texas, in July 1892, did he not, in the interest of this Bank?

A. Well, I suppose he did. I suppose so, I don't

know, I couldn't say.

Q. Well, that is the time he was there?

A. Well, I suppose so.

Q. Well, what officer of your Bank can give that information?

A. I can't tell you.

Q. Did he visit Jefferson at all as a representative of the Bank in 1892?

A. My impression is that he did.

Q. What business of the Bank did he have in charge when he went to Jefferson?

A. Some settlement with Mr. Bemis, as I understand it.

Q. Your Bank had about $70,000 involved in the collapse of the Jefferson Lumber Company?

A. Bemis and some others owed a large amount, I can't just tell you the amount it was, incurred before I was an officer of the Bank.

Q. That occurrence was in 1891?

A. It was done before I was an officer of the Bank?

Q. You were an officer in 1892?

A. Yes sir, I came in there in May, 1892.

Q. May, 1892?

A. Yes sir.

Q. Does the Bank own some stock in the Kildare Lumber Company?

A. Yes sir.

Q. How did they obtain that?

A. From Judge Robinson.

Q. Do you know what consideration they paid for that?

A. I do not.

Q. Does the Bank still hold some claims against the Jefferson Lumber Company and J. H. Bemis & Co., for $70,000, in the neighborhood of that, I don't know the exact figures?

A. Yes sir, if that old claim is against Bemis, and that the proper name of the Company, we do. I don't

know just the name.

Q. J. H. Bemis & Co. and Jefferson Lumber Company?

A. I don't know the names of them.

Q. You still hold these claims?

A. Yes sir.

Q.; Can you state whether the bank in consideration of these notes has cancelled any of those claims?

A. No sir, I think not. My impression is that they have not.

Q. They have not cancelled them?

A. Nor sir.

Re-direct examination, by Elijah Robinson.

Q. I will get you to state whether there has been any payments made on either of these notes other than stated.

A. No sir.

E. F. MARSHALL.

Sworn to before me on the day, within the hours and at the place in that behalf aforesaid; and subscribed before me this 20th day of August, 1894. My commission expires January 23rd, 1898.

LEE B. EWING,
Notary Public, Jackson County, Mo.

Elijah Robinson, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

I am an attorney for the National Bank of Commerce of this city, and have been for more than three months. In July, 1892, the Kildare Lumber Company, by W. B. Ward, President, executed and delivered to me three notes, each dated July 13th, 1892. One for the sum of $10,049.59, due six months after date; another for the same amount and due twelve months after date, and the third one for $10,049.60, due eighteen months after date. I indorsed and transferred these notes without recourse to the plaintiff in this case, The National Bank of Commerce of this city, shortly after I received them from the Kildare Lumber Company, and

from my connection with the bank, I am able to state that they have been the property of said bank since that time, and there has been no payments made on the notes since they were executed. There is a credit of $791.20 on one of them, on the one that matures first, the note due six months after date, but that credit doesn't represent a payment. It was simply made to correct a mistake that occurred in the amount when the notes were executed, and inasmuch as there has been a deed of trust given to secure the payment of these notes, and this deed of trust had been prepared and acknowledged, and possibly sent to be recorded, before the mistake was discovered, the credit was simply placed on it instead of making new notes and a new deed of trust. These are the notes sued on in the case of the National Bank of Commerce of Kansas City, Mo., against the Kildare Lumber Company and others, in the United States Circuit Court at Jefferson, Texas. I have stated that these notes were secured by a deed of trust on certain property in Texas, and I attach to this deposition and make a part of it, a certified copy of said deed of trust, The original deed of trust is not in my possession, and I don't think ever has been, If I ever had the original deed of trust I have lost it or mislaid it, but I am under the impression it was never in my possession.

Cross examination, by F H. Prendergast:

Q, Were you there in May when the sale was consummated at Jefferson?

A, Yes sir,

Q, When the sale or the property of the Jefferson Lumber Company was consummated, by the receiver by the commissioners?

A. Yes sir, I was there in May when the property was offered for sale and bought in—sold. The sale was not approved at that time, because the Court was not in session then.

Q. Were you one of the purchasers?

A. Yes, sir.

Q. The purchasers as I understand, were Elijah Robinson, John M. Bemis, W. B. Ward and W. B. Chew?

A. Yes sir.

Q. Was anybody else, I think that was all?

A. Yes, that is right.

Q. What was the understanding by which you were let in with them as a purchaser? What was the basis of the agreement by which you were a party to the purchase?

A. The agreement between Mr. Ward, Mr. Chew, Mr. Bemis and myself was reduced to writing, and I can show you the paper if you desire.

Q. Is it the paper that was attached to those affidavits on that motion to remove the receiver?

A. There never was but one contract between those gentlemen and myself. We used that contract before Judge Bryant, at Sherman, Texas, but I don't remember whether it was attached to an affidavit or not.

Q. Well now, upon what consideration were you let into that purchase?

A. I was let into the purchase on the same consideration that the other three men were. We agreed among ourselves to buy the property.

Q. Well, were you not let in as the representative of the Bank of Commerce of Kansas City.

A. I object to the word "let in" because I was not let in.

Q. Did you become a party to the purchase with Bemis, Ward and Chew and upon what consideration, or didn't you become a party as the representative of the National Bank of Commerce.

A. Yes sir, I was acting for the National Bank of Commerce in the matter, and the Bank of Commerce furnished the money that I paid for my interest in the property that was purchased.

Q. The one fourth of the $13.000?

A. Yes sir; the Bank of Commerce furnished the money.

Q. Now, what consideration did you pay for these notes which you hold in your hand.

A. A fourth interest in the property which we purchased at commissioners' sale. I sold my fourth interest in that property to the Kildare Lumber Company.

Q. Have you ever made a deed?

A. Yes, sir.

Q. Transferring the property to the Kildare Lumber Company?

A. My recollection about the matter now is that I executed a power of attorney to Mr. Schluter or Mr. Culberson, one or the other, and they executed the deed to the Kildare Lumber Company.

Q. At the time these notes were given?

A. Yes sir.

Q. What consideration did W. B Ward give for the interest he got in the new company?

A. I don't understand your question, Mr. Prendergast.

Q. Well, Mr. Ward got certain interest in the new company under this contract, carrying out this contract that you had. My idea is to show whether he paid anything more than his fourth of the $13,000 for his interest in the purchase.

A. When the property was purchased, whether Mr. Ward paid anything more than the others?

Q. When Ward got his stock in the new company did he pay anything more than his fourth interest in the purchase?

A. My understanding of the matter is that Mr. Ward deeded to the Kildare Lumber Company the fourth interest which he acquired in the property sold by the commissioners, and that the notes and stock that were given him were in consideration of his one fourth interest in the property.

Q. Do you understand that he gave nothing else, that he cancelled any of his obligations against the Jefferson Lumber Company?

A. I never understood that he was to do so. I didn't understand that the Jefferson Lumber Company had any interest in the matter whatever, or any concern with it.

Q. Did the National Bank of Commerce just take the transfer of those notes from you or did they pay a valuable consideration to you for them, when you transferred those notes?

A. There was no consideration passed between the bank of Commerce for the notes other than the fact that they had furnished the money with which to pay my one-fourth part of the purchase price of that property.

Q. Is the Bank of Commerce the real owner of all of the stock that was issued under direction down there to Mr. White and yourself?

A. Yes sir, the stock was issued to Mr. White and myself, but the Bank of commerce is the equitable owner of the stock. That is, the legal title to the stock is in us, but they are the beneficial owners of the stock.

Q. Well now, do you remember the amount in round numbers of the debt, $31,000, debt and $39.000 stock, that approximates it?

A. I have given the amount of the notes. There was ten shares of stock issued to me and 381 and 61-100 shares issued to Mr. White at the par value of $100 per share, making $39,161., I believe.

Q. Well,is is not a fact that the notes are 40 per cent and the stock 60 per cent of the indebtedness of the National Bank of Commerce against J. H. Bemis & Co., and the Jefferson Lumber Company?

A. Yes sir, that is true; that is in accordance with the written agreement that was entered into at the time this property was sold.

Q. Why was it used 40 per cent and 60 per.

cent of this indebtedness to determine how much you should have?

A. Because this agreement was entered into among the creditors. Mr. Ward representing himself and the bank of which he was President had considerable amount of indebtedness against Mr. Bemis and the Jefferson Lumber Company, and I, representing the Bank of Commerce, had considerable indebtedness against the Jefferson Lumber Company, and we agreed that we would buy the property and sell it to a new company to be organized, and take in payment for the interest that we acquired in the purchase of the propperty 40 per cent. in notes secured, and an amount equal to 60 per cent. in stock. The Jefferson Lumber Company was insolvent, J. H. Bemis & Co. were insolvent, at the least so regarded, and we entered into this agreement as being the most just and equitable thing that we could do as between ourselves. Afterwards, upon the suggestion of somebody, Mr. Chew and Mr John M. Bemis were taken in.

Q. Who actually bought off the property; wasn't it Mr. Chew that bought it off?

A. I don,t no sir, I was not there when it was bought in. I was not present when the property was bought off. Mr. Ward or J. H. Bemis suggested, one or the other, I dont remember which, that there ought to be a written agreement before the property was bought in, and suggested to me to prepare it, and while I was preparing this agreement the property was sold. Mr. Bemis had promised me to send word down to the court house and stop the sale until after the agreement had been prepared, but before it was finished the property was sold and bid in, I understood, by Mr. Chew. I was not present.

Q. Well, now, do you remember the amount of Mr. John M. Bemis' claim?

A. No. I don't remember the amount. There were so many amounts and it has been so long ago that I don't remember.

Q. Was the agreement between yourself, W. B. Ward, W. B. Chew and John M. Bemis to this effect: That each of you four were to contribute an equal amount of the $13,000 to pay the purchase money for the purchase of the Jefferson Lumber Company property, and that each of you were to share in the property purchased in proportion to the indebtedness that each held against the Jefferson Lumber Company and J. H. Bemis?

A. The written agreement set forth exactly what the contract was between us. If you want me to go outside of that and tell my notion about it, I can do so. In the first place it was agreed between Mr. Ward and myself that I should bid in the property, and that I would convey it to the corporation, which would be organized, and that he was to furnish one-half of the money to pay for the property and I the other half. In conveying it to the corporation, the corporation was to execute its note to me for an amount equal to 40 per cent. of the claim the Bank of Commerce had against the Jefferson Lumber Company and Bemis & Company, and execute to Mr. Ward notes equal to 40 per cent., and stock equal to 60 per cent. that he and his Bank had against those concerns. The way that agreement happened to be made was this: Mr. Bemis had been trying to—pretending at least to try to make some settlement with the Bank of Commerce, and had not been able to do so. The property was advertised for sale and I went down there, and in the course of a conversation told Mr. Bemis that I was going to bid on the property, and I said to him that I thought that he had treated the Bank of Commerce badly; that they had never made a cent out of them. These acceptances that we held against him was all the business they had ever done with him. And they thought, and had reason to think, that these acceptances were drawn against actual consignments of lumber and so on. Mr. Bemis said he was sorry that he was not able to pay the Bank, and so on, and I suggested

to him that the creditors would probably eat up the property in litigation, and I thought it was the best thing for some of the largest creditors to make some sort of an equitable agreement among themselves and bid in the property, and he said that he thought that correct, and that he would see Mr. Ward. Mr. Ward was one of the largest creditors that was secured in the deed of trust, and afterwards he and Mr. Ward came to me, and the agreement that was entered into was made in pursuance of that, or rather was brought about in that way. That was the origin of it. The reason that the original agreement was carried out.

Q. That is, between you and Mr. Ward?

A. Yes; and the property bid in by me was that Mr. Bemis, who seemed to take an interest in having the creditors meet in some way, came to me and said that Mr. Ward was not willing that I should bid in the property. Mr. Ward, and possibly Mr. Chew, was not willing that I should bid in the property, and wanted to bid it in themselves, and I said to Mr. Bemis that they could trust me just as far as I could trust them, and I wouldn't consent to their bidding it in, but that I would go in with them and bid it in, in the name of each one of us, and he said he supposed that would be satisfactory, and then suggested the question of his brother, John M. Bemis being a party, and I told him I had no objection. The agreement between Mr. Ward and myself is set forth in the paper, but the agreement was, that in order to avoid litigation with the creditors of the Jefferson Lumber Company who had been secured, or undertaken to be secured by this old deed of trust, we would give them in the new corporation stock equal to the amount of their claims, if they would make no fight.

Q. These secured creditors?

A. Yes, these secured creditors. None of these secured creditors were parties to the agreement.

Q. Ward was secured?

A. Well, none besides Mr. Ward and John M. Bemis.

Q. Did Mr. Chew represent a preferred claim some way?

A. I don't think he did.

Q. I don't know, but I thought he did.

A. I don't think he did. I wouldn't be positive but I don't think he represented anybody that was preferred in that deed of trust.

Q. Well, why was it that the old debt was used as a basis for the interest you should have in the new corporation, if the old debt was not to be affected?

A. Simply because it was an agreement between creditors. That was all. If I had not represented a creditor and Mr. Ward had not represented a creditor, there would have been no reason in the world why we should have made the indebtedness of his and of our Bank the basis of the claim of notes and stock that were issued, but that seemed to me and seemed to them to be a just and equitable arrangement between the creditors.

Q. Were any of the obligations of the Jefferson Lumber Company or of J. H. Bemis & Co., then held by the National Bank of Commerce to be cancelled in consideration of this new stock and new debt?

A. No sir, not a single one of them. There never was a word said about cancelling any of them. There was a question when the new corporation—about the time the new company was organized, and I was at Jefferson, for the purpose of making conveyance and taking the notes and stock. There was a question as to the amount. We went to work and figured up the amounts. It was ascertained for some reason that the thing couldn't be consummated at that time, but we did undertake to agree upon the amounts that would be going to Mr. Ward, and the amount that would be going to me, and there was a question then about whether a certain claim, which we held against the Southwestern Lum-

ber Company, should be deducted and J. H. Bemis, who, as I supposed at the time, had paid off some of these people, if he ever owed them, and held their claims, was present and taking part in the conversation, and he suggested that if the bank which I represented should succeed in collecting that claim against the Southwestern Lumber Company, that the stock and notes should be reduced by that amount, and I told him that we would not agree to it, for the reason that the Thames National Bank, of Norwich, Conn., had sued us for conversion of the stock of lumber that we had levied upon, for $10,000, and the suit was then pending; and he thought he would get that suit dismissed, and I said, very well, I will be glad to have you do it, and we will give you credit for the amount. I told him to give a bond to protect us and he said he wouldn't do it, and that was the end of that matter. There was another question came up as to whether or not we had collected at that time the claim, I believe, from the Southern Pine Lumber Company.

Q. Is that the Indian Territory business?

A. Yes, what I have been speaking about. There was another question arose as to whether we had collected at that time the claim against the Southern Pine Lumber Company, I think that I didn't know whether it had been collected or not. I knew we had collected some of the demands and it was agreed at that time that the amount should be thus and so, and if that claim had been collected it would be reduced that much. When I returned home, I found that claim had been collected and I prepared notes for the Kildare Lumber Company to sign, and sent them down there, but they had already executed these notes that I mentioned a while ago, and instead of making new notes, they undertook to correct the matter by indorsing a credit on the back of one of these notes.

Q. That is the credit now indorsed?

A. That is the credit now endorsed.

Q. The effect of that agreement that Schluter made to return those notes, if you have no objection, I will have you state about that. I don't look on it necessarily as a cross examination. Do you remember?

A. Yes, I know what you refer to, but I don't know what you want me to say about it.

Q. There is a list of claims purporting to be against the Jefferson Lumber Company and Bemis, and which Mr. Schluter down at the bottom agreed to return. What do you know about this agreement made by Mr. Schluter?.

A. I dont know anything about it except that Mr. Schluter and Mr. Bemis told me. That is, I don't know anything about the signing of this paper, except what they told me.

Q. Were you there just prior to July 13th, at Jefferson, Texas?

A. Yes, I was there a few days before that.

Q. You left a few days before the notes were made?

A. Yes.

Q. Did you leave anybody representing you there?

A. No sir, not other than Mr..... I was to send the form of the notes and by-laws, and everything down there to them, and they were to execute the notes and send them to me.

Q. Well, was anybody there representing you in this negotiation?

A. Not as I know of.

Q. Didn't Mr. Schluter receive the papers and send them to you?

A. I believe he sent some of them, yes.

Q. Did you send the papers that you sent, to Mr. Schluter?

A. I don't remember now whether I did or not.

Q. Hadn't Mr. Schluter recovered judgment for this bank in the Federal Court down there, on many of these obligations?

A. Mr. Schluter recovered judgment for some of them. That is, he and myself and Mr. Culberson together. I brought suits down there on some of these claims, I don't know just which ones now without reference to papers, but quite a number of them, five different suits, I think, in the Federal Court, and it was impractical for me to be there every time a motion was called up or anything of the kind, and I thought it was proper to have some local counsel there and I made arrangements with Mr. Schluter and Mr. J. H. Culberson, to assist in looking after those cases. Mr. Schluter had nothing whatever to do with the agreement that was made between me and Mr. Ward and Mr. Chew, and John M. Bemis, nothing in the world. Mr. Schluter had no authority whatever to enter into any such contract as that that you have referred to, and I hadn't any intimation whatever that he had done so until—I think it was in July, 1893—Mr. Bemis admitted in my presence that that paper was signed the day it bears date. He took it to Mr. Schluter sometime after those notes were delivered.

Re-direct examination:

The contract that was prepared the day the sale was made was subsequently destroyed, because it didn't fully express the agreement entered into between the parties. The same day of the sale and an hour or two afterwards, the parties interested in the purchase, Mr. Chew, Mr. Ward and myself met in Mr. Armistead's office, and it was agreed that the next day we should get together and prepare a contract setting forth fully the agreement between us. The next day we met at the office of Mr. J. H. Bemis and prepared the contract; it was signed by all four of the purchasers, Chew, Ward and myself personally and by Mr. Ward for John M. Bemis.

We were an hour or two preparing that contract. It was written and re-written, and changes made to meet the suggestions that would be made by the different parties. In addition to the parties to the purchase that were present, there were present, Mr. Thomas Byrne and J. H. Bemis. Mr. Schluter had nothing, whatever, to do with the contract that was entered into between Mr. Ward, Mr. Chew, John M. Bemis and myself. He was not, so far as I remember, present at any conversation that took place leading out to the matter of the contract, nor was he present, as I remember now, when the contract was written and signed. And whatever Mr. Schluter had to do with the acceptance of the papers from the Kildare Lumber Company, and transmitting them to me, or with the receiving of any papers for them and handing them to the officers of the Kildare Lumber Company, was simply a matter of courtesy. During the time that I was at Jefferson, jnst before these notes were sent, they are dated the 13th of July, Mr. Ward, J. H. Bemis and myself had repeated conversations, and they had every opportunity to ask me to sign such a paper, if they had supposed there was any such contract, and no such thing was ever intimated by either of them. I wish to say further, that after my return from Jefferson, after I had received these notes and this stock, I turned them over to the Bank of Commerce. The conversations between me and the officers of the Bank, were with Mr. Schwitzgebel and Dr. Woods principally. Mr. Schwitzgebel is assistant cashier and Dr. Woods is president. Neither of them happened to be in Kansas City at this time. The conversation about the notes at the time they were delivered, was with Mr. Schwitzgebel, and the notes were delivered to him as assistant cashier. Dr. Woods, at that time, was not at home, but after he returned home, some time later, the conservations were principally between me and him.

Re-cross examination by F. H. Prendergast;

Q. Was it insisted by any of the parties at Jefferson, either J. H. Bemis or the parties in interest, that these obligations which the National Bank of Commerce has should be delivered up?

A. When?

Q. At the time of the organization of the Kildare Lumber Company?

A. Not one single word said about it.

Q. Not by either of you?

A. Not by either of us, not one word. We were discussing every feature of it that occurred to any person as being important, and put it in the contract, everything that was discussed to complete the arrangement was put in to the contract, and I never heard of anything of this until some time after that, I don't know how long. Mr. Schluter either wrote to me or told me that Mr. Bemis wanted him to surrender the papers upon which the judgment had been rendered in the Federal Courts at Jefferson, and I rather objected to doing so, and Mr. Schluter said that Mr. Bemis wanted to use these claims in some adjustment with some body else, Howell, Jewett & Co., possibly, and that it could do my client no harm to surrender them, because they were already in judgment, and, if I said so, he would get permission from the Court to withdraw them. I told him, in that view of the case, I had no objection. Even then, Mr. Bemis didn't say anything about signing this paper.

Mr. Ward as the President and Mr. Bemis as the manager—I think, I am sure, Mr. Bemis as the manager of the Kildare Lumber Company, and I think he acted with Mr. Ward's approval, offered to pay the first of the notes held by the Bank of Commerce, that is, the one that matures first, shortly after its maturity, if the Bank of Commerce would give them a credit for some collections that had been made on an attachment suit that I brought here, and this Southwestern Lumber Company claim, and take their notes for 75

and 90 days, I think.

Q. Who was it that was made by. Who do you say that you got that information from?

A. Well now, I don't remember whether I got it from a letter from Mr Schluter or how it did come to my knowledge now, but there was an offer of that kind made. I don't remember now. Whether Mr Ward wrote to the bank and the Kildare Lumber Company would pay the first note that matured, if they would allow certain credits and surrender to J. H. Bemis the paper they held against J. H. Bemis & Co., and the Jefferson Lumber Company. I don't now remember but if they had received any such letter, the proposition would not have been accepted for two reasons: In the first place, they had not made any agreement to surrender the paper, and in the second place, the credits they claimed were unjust.

Re-direct examination.

I will attach to this deposition a copy of the contract between M. Ward, Mr. Chew, Mr. John M. Bemis and myself.

ELIJAH ROBINSON.

Sworn to before me on the day, within the hours and at the place in that behalf aforesaid; and subscribed before me this 20th day of August 1894. My Commission expires on the 23rd day of January 1898.

LEE EWING,
Notary Public, Jackson County, Mo.

State of Missouri }
County of Jackson } I, Lee B. Ewing, a Notary Public within and for the County of Jackson and State of Missouri, hereby certify that on the 20th, day of August 1894, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day at the office of Elijah Robinson, at Room 24 Wale's Building, corner of Sixth and Delaware streets, in Kansas City Mo., in pursuance of the notice hereto attached, came before me, said Notary Public, F. E. Marshall and Elijah Robinson, who were by me sever-

ally sworn to testify the truth, the whole truth and nothing but the truth in a case now pending in the Circuit Court of the United States within and for the Eastern District of Texas at Jefferson, wherein the National Bank of Commerce of Kansas City, Mo., is plaintiff and the Kildare Lumber company, et al. are defendants; and the said witnesses were, after being sworn, examined and their examination reduced to writing and signed by them in my presence; and I further certify that both the said Marshall and the said Robinson are residents of Kansas City, Mo., which is more than one hundred miles from the City of Jefferson and State of Texas, where the above mentioned Court is held.

In witness whereof, I hereunto set my hand and notarial seal this the 23rd day of August 1894.

(SEAL) LEE B. EWING,
Notary Public, Jackson County, Mo.

It is hereby stipulated and agreed that copies of the notes referred to in the testimony of F. E. Marshall and Elijah Robinson, may be attached to their deposition instead of the original notes, provided that the plaintiff produce in court the original notes when required by any of the defendants. And it is further agreed that a copy of the deed of trust referred to and of the contract between Robinson, Ward, Chew and Bemis, referred to in said deposition, may be attached instead of the original and used to like purpose and effect as the original.

It is further agreed that the above certificate of the Notary to said deposition is sufficient and all that would be required, and if the same is not in any way defective, no objection will be taken thereto.

ELIJAH ROBINSON,
Attorney for Plaintiff.
F. H. PRENDERGAST,
Attorney for Defendants.

NOTARY FEES.

72 fols, at 15c $10.80

3 Certificates and Seals, at 50c..... 1.50
Swearing 2 witnesses, at 20c..... 20

$12.50

Paid by plaintiff

LEE B. EWING,
Notary Public.

$10,049.59,

Jefferson, Texas, July 13th, 1892.

Six months after date we promise to pay Elijah Robinson or bearer, the sum of Ten thousand and forty-nine 59-100 dollars, for value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent. per annum, at National Bank of Commerce Kansas City, Mo.

KILDARE LUMBER CO.

No. 42451 Due January 16, 1893. W. B. Ward, President.

Across the back of said note is the following:
"This note reduced by 40 per cent. on $1978.07 being Amount Southern Pine Lumber Co. acceptance paid being $791.20" "without recourse."

ELIJAH ROBINSON.

$10,049.50. Jefferson, Texas, July 13th, 1892.

Twelve months after date we promise to pay to Elijah Robinson or bearer Ten thousand and forty-nine 59-100 dollars for value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent. per annum at the National Bank of Commerce, Kansas City, Mo.

KILDARE LUMBER CO.

No. 42452 Due July 16, 1893, W. B. Ward, Prest.
Across the back of said note is the following:
Without recourse.

ELIJAH ROBINSON.

$10,049.60.

Jefferson, Texas, July 13th, 1892.

Eighteen months after date we promise to pay to Elijah Robinson or bearer, Ten thousand and forty nine 60-100 dollars, for value received negotiable and payable without defalcation or discount and with interest from date at the rate of six per cent. per annum, at the National Bank of Commerce, Kansas City, Mo.

KILDARE LUMBER CO.

No. 42453 Due January 16, 1894. W. B. Ward, President.

Across the back of said note is the following:

"Without recourse."

ELIJAH ROBINSON.

This agreement entered into this 3rd day of May 1892, between W. B. Ward, J. M. Bemis, W. B. Chew and Elijah Robinson.

WITNESSETH: That whereas, the said Ward, Bemis, Chew and Robinson have this day purchased at sale by H. A. O'Neal, Receiver of the Jefferson Lumber Company all the property and effects of said Company; and that whereas it is proposed by the said Ward, Bemis, Robinson, Erastus Jones and others, or their assigns, to organize a corporation under the laws of the State of Texas, and with a capital stock equal to one hundred and eighty-five thousand dollars of the preferred claims against the Jefferson Lumber Company and the claims of the National Bank of Commerce of Kansas City, Mo., against said Company, and the claim of said Bank against J. H. Bemis & Co. and the claims of the National Bank of Jefferson against said Lumber Company and the interest of all of said claims from maturity thereof, less forty per cent of the said claims of said National Bank of Commerce and said National Bank of Jefferson.

And whereas, it is proposed by said Erastus Jones, J. M. Bemis, J. B. Alexander, or their assignee,

Grigsby Bros., Sulphur Lumber Company, Southern Nat. Bank of New York and W. B. Ward, to release and convey to said corporation, to be hereafter formed all the property conveyed by the Jefferson Lumber Company, by deed of trust, or otherwise, to them or to any other trustee for their benefit.

Now, therefore, the parties hereto do hereby agree that upon the confirmation of the said receiver's sale and a conveyance being by said receiver made to them of the property by them purchased at the sale this day made, and upon the release and conveyance to said new corporation of all the property conveyed by deed, deeds of trust or otherwise, as hereinbefore mentioned, they, the said parties hereto, will convey to said new corporation all the right, title and interest in them vested by said receiver's sale and conveyance, they to be paid for said property as follows: The said Chew is to be paid one fourth of the amount bid for said property, to-wit: ¼ of $13,000.00, which is to be paid in cash.

The said Ward is to be paid, ¼ of $13.000.00 in the note of said corporation secured by a deed of trust on the property therof, and in addition thereto, the amount of indebtedness of the Jefferson Lumber Company to the Nat. Bank of Jefferson, and interest thereon, 40 per cent. of which is to be paid in the note or notes of said new corporation, secured by a lien on its property, and the other 60 per cent. in stock of said corporation at par; the said Bemis to be paid 1-4 of $13,000.00 in the note or notes of said corporation secured by a lein on its property, and in addition thereto a sum equal to the indebtedness of said Jefferson Lumber Company to him mentioned in the general deed of trust executed by said Jefferson Lumber Company and the interest thereon which is to be paid in the stock of the new corporation at par; and for said Robinson's interest in said property there is to be paid ¼ of $13,000.00 which is to be paid in the note or notes of said corporation, secured by a deed of

trust on its property, and in addition thereto the amount of the claims of the National Bank of Commerce, of Kansas City, Mo., against J. H. Bemis & Co., and its claims against the Jefferson Lumber Co., and interest on said claims, of which 40 per cent is to be paid in the notes of said new corporation, secured by deed of trust on its property and the remaing 70 per cent in the stock of said new corporation at par; the said note or notes to be payable to said National Bank of Commerce of Kansas City, Mo., and said stock to be issued to said bank or such person as it may direct.

The said notes to be made by the new corporation are to be all on an equal footing so far as the security is concerned, that is, no note or notes to have a preference or priority over any other note or notes.

And said notes are to be secured by deed of trust on all the property of said new corporation, unless the parties to whom the same may be made agree to take a deed of trust on a less amount of property. If said Erastus Jones, J. M. Bemis, J. B. Alexander or his assignee, Grigsby Bros., Sulphur Lumber Co., Southern National Bank, W. B. Ward or any of them, refuse or fail to execute for said new corporation releases and conveyance herein provided for, then this agreement is to be of no further force or effect. The stock mentioned herein as going to J. M. Bemis and W. B. Ward is to be issued to them respectively, or to such person or persons as they may direct.

Witness our names hereunto subscribed the day and year first above written.

ELIJAH ROBINSON,
W. B. WARD,
J. M. BEMIS,
By W. B. WARD, Agent,
W. B. CHEW.

The notes to be given to the National Bank of Commerce, for the 40 per cent. of their claim (40 per cent) shall be made in equal amounts payable in six, twelve and eighteen months with six per (6)

cent. per annum interest from date of note, and the other notes herein provided for, are to bear six per cent. per annum interest from date of note, and run 4 and 6 months with privilege of renewing.

ELIJAH ROBINSON.

The State of Texas, }
Marion County. } Know all men by these presents, that whereas, at a meeting of the Directors of the Kildare Lumber Company, held at its office, in the City of Jefferson, Texas, the 13th day of July, 1892, the following resolution, or ordinance, was unanimously adopted, to-wit:

Resolved, That the President of this Company be, and he is hereby instructed to purchase from W. B. Ward, W. B. Chew, John M. Bemis and Elijah Robinson, at and for the sum of $171,354.80-100, all of the property heretofore belonging to the Jefferson Lumber Company, and purchased by them from H. A. O'Neal and E. A. Allday, Commissioners under an order of Court directing the sale of same, in the case of the National Bank of Galveston vs. The Jefferson Lumber Company, in the District Court of Marion County, Texas. And the said President is further directed and instructed, after deducting from the said purchase price, the amount of the stock subscribed in the Kildare Lumber Company by the said parties, or either of them, to execute and deliver for the balance of such purchase price the prommissory notes of the Company to the persons, in sums, and payable as follows, to-wit:

To W. B. Ward:

Four notes each for the sum of $4,555.39, payable on October 13th, 16th, 19th and 22nd, 1892, respectively. One note for $6,073.85, payable January 16th, 1893. Two notes each for $6,073.85, payable January 19th, 1893 and January 22nd, 1893, respectively. One

note for $750,00, payable three months after date. One note for $2,500.00 payable four months after date, each and all of said notes to bear interest at the rate of six per cent. from date.

To Jno. M. Bemis: One note for $250.00, payable three months after date. One note for $2000.00, payable four months after date, each with six per cent. interest from date.

To Elijah Robinson: Two notes each for the sum of $10,049.40, payable in six months and twelve months after date respectively.

One note for $10,049.60, payable 18 months after date, all of said notes to bear six per cent. interest from date.

Three notes—2 for $10,049.59.

One for $10,049,60.

To W. B. Chew: One note for $3250.00, payable 30 days after date, with 8 per cent. interest after maturity.

And the said president is further directed to make, execute and deliver to L. S. Schluter, trustee, selected by both these parties and the Company a good and valid deed of trust in the name of the said Company for the purpose of securing to the said parties the payment of the above named sum of money and for this purpose shall embrace in said deed of trust all the said property which this company shall buy from them as aforesaid except the stock of lumber and merchandise on hand.

Now therefore in consideration of the premises and the sum of ten dollars to us in hand paid the receipt of which is hereby acknowledged, the Kildare Lumber Company has this day granted, bargained, sold and conveyed unto the said L. S. Schluter, trustee, and his successor and substitute as hereninafter provided, all the following described property, both real and personal and being the same property heretofore owned by the Jefferson Lumber Company and more particu-

larly described as follows, to-wit:

Described as follows, at Kildare:

One locomotive, 24 logging cars, one box car, one passenger coach, one hand car, 2 push cars, twelve (12) miles of railroad, known as the Kildare & Linden railroad, together with the stations at Kildare and Linden; section houses, sidings and everything used in connection with said railroad. Also, the extension of said road made by H. A. O'Neal, receiver of said Jefferson Lumber Company. Also planing mills at Kildare and all fixtures and everything used in connection therewith. Also two saw mill and fixtures known as the Kildare and Number Two mills, and also miscellaneous property, all of which said property above mentioned is fully described in Exhibit A attached to O'Neal and Allday's report of sale, filed in the above cause, June 21st, 1892, which is now referred to and made a part of this deed.

Also the following described property at Atlanta, Cass County, Texas, to-wit: One saw mill and fixtures, also planer and two locomotives, and logging cars, blacksmith shop, etc., and about twelve (12) miles of railroad, known as the Atlanta & Mount Pleasant railroad, together with sidings, etc., and everything used in connection with said road, also miscellaneous property. A full description of the property above mentioned will be found in Exhibit B attached to H. A. O'Neal and E. A. Allday's report of sale filed by them in the above cause June 21st, 1892, which said Exhibit is now referred to and made a part of this deed.

Also trial balance of accounts of the Jefferson Lumber Company due on the 21st day of July, 1891, showing bills receivable of two hundred and thirteen thousand six hundred and 13-100 dollars, which were deposited by J. H. Bemis, president of the Jefferson Lumber Company, prior to July 21st, 1891, with various and divers persons as collateral to secure debts of said company,

and all of which items will fully appear in exhibit attached to said report and marked J which said exhibit is now referred to and made a part of this deed. Also the following described real estate situated in Cass county, Texas, to-wit:

$104\frac{3}{4}$	Acres of land	Wm. F. Young	Survey.
420	"	B.B.B. & C.R. & Co.	"
1535	"	Benj. Hawkins	"
$916\frac{8}{10}$	"	"	"
341	"	"	"
521	"	"	"
225	"	John Leck	"
451	"	Henry Warnell	"
881	"	John Casternon	"
397	"	John Davis	"
75	"	John McKerley	"
$116\frac{2}{8}$	"	"	"
200	"	Robt. Maxwewll	"
400	"	"	"
800	"	"	"
200	"	"	"
100	"	James Jackson	"
190	"	Evan Watson	"
540	"	W. F. Loving	"
300	"	James Berry	"
135	"	Honitt Brown	"
$1660\frac{1}{20}$	"	M. D. Frazier	"
$553\frac{1}{3}$	"	"	"
88	"	Andrew Hampton	"
380	"	"	"
427	"	"	"
87	"	"	"
$329\frac{3}{4}$	"	"	"
1476	"	James Brown	"
557	"	John Barkman	"

For a more perfect description of the thirty-one tracts above mentioned a reference is hereby made to a deed from the Jefferson Lumber Company to Erastus Jones dated July 1st, 1891, which said deed is recorded in

the office of the County Clerk of Cass County Texas, deed Register R, 2 pages 383 to 388 inclusive. Also the following tracts of land situated in Cass County Texas.

1600	Acres	James Clark	survey.
1405	"	"	"
160	"	"	"
1312	"	William Donahoe	"
832	"	"	"
320	"	R. C. Graham	"
480	"	L. H Walker	"
57 1-2	"	I. S. Lunley	"
200	"	Evan Watson	"
100	"	John Nall	"
175	"	John Davis	"
460 1-2	"	Henry Warnell	"
55	"	T. J. Foster	"
397	"	John Davis, H. R.	"

For more particular description of the last named fourteen (14) tracts of land a reference is hereby made to a deed from the Jefferson Lumber Company to W. B. Ward, dated July 3rd, 1891, which said deed is duly recorded in the County Clerk's office, Cass County, Texas, in Deed Register 22, pages 228 to 331, inclusive.

Also the following described tracts of land, situated in Cass County, Texas:

640 Acres B. B. B. & C. R. Ry. Co. Survey. Abstract 131.

1545	Acres	Geo. S. Young, H. R.	Survey.
114	"	John Hall	"
320	"	Richard Barrington	"
934	"	S. Demman	"
79	"	B. B. B. & C. R. R. Co.	"
160	"	M. D. Frazier H. R.	"
800	"	James Clark H. R.	"
186 2-3	"	Wm. Smith	"
320	"	B. B. B. & C. R. R. Co.	"
320	"	B. F. Whitaker	"

175	"	P. M. Keaton	"
160	"	E. T. Jackson	"
125	"	J. M. Givens	"
320	"	Jessie Walling	"

Block No. 34 in the town of Kildare.

640	"	Joseph Jones	Survey.
1 12-100	"	Jane Richie	"
9	"	Jane Richie	"
334 1-3	"	Fisher & Miller	"

Right of way purchased from M. A. Birmingham and Everett of a portion of P. M. Keaton survey.
208 Acres ..... William Donahoe survey
160 " ..... R. Britt "

For a more perfect description of said last named tracts (23) of land a reference is hereby made to a deed of trust from the Jefferson Lumber Company to W. R. Camp trustee dated July 7th 1891, and recorded in the County Clerk's office, Cass County Texas, in Record Book D of Mortgages 199, to 215 inclusive.

Also 834 acres of land situated in Cass County Texas, being a portion of the Henry Buckler, H. R. survey, being same land deeded by J. H. Bemis to H. D. K. Bemis, July 7th 1891, said deed is recorded in the County Clerk's office, in Cass County Texas in Record R 2 page 326. Also 74 1-2 acres A. Emanuel H. R. survey, deed by John Allison to Whitaker and Galloway March 4th 1885, which said deed is recorded in County Clerk's office Cass County Texas, in deed record G 2 page 207 which said deed is now referred to and made a part hereof.

Also 85 acres of land a portion I. M. Watson survey being same land deeded by D. H. Zachry to the Jefferson Lumber Company April 11th 1887. which said deed is recorded in Book J 2 page 12 in County Clerk's office, Cass County, Texas.

Also 283 1-3 acres a portion of the John McKirley survey deeded from D. D. Dodd to the Jefferson Lumber Company July 9th, 1891, which said deed is re-

corded in County Clerk's office Cass County, Texas, Record Book M 3 pages 442 the last four named surveys are located in Cass County Texas.

Also pine timber upon the following named surveys in Cass County, Texas.

160 acres, Wm. Hutton deeded from J. O. Lockett to the Jefferson Lumber Company September 26th, 1890, said deed recorded in the County Clerk's office Cass County Texas, in book R 2, page 57. Also 100 acres R. C. Graham survey deeded by J. F. Latham to the Jefferson Lumber Company, deed not of record.

Also 239 acres E. Frazier, P. Price and O. F. Holcomb survey deeded by J. W. Smith to the Jefferson Lumber Company November 21st, 1889, which said deed is recorded in County Clerk's office Cass County Texas, in deed Record O 2 page 468. Also 202 acres W. B. Wilson and J. M. Borren survey, deeded from J. L. Stone to the Jefferson Lumber Company May 1888 said deed recorded in County Clerk's office in Deed record L "2" page 283. Also the right of way over the following described lands: 308 acres of the John Lick survey deeded by J. A. Duncan and wife to the Jefferson Lumber Company March 4th, 1890, the deed is recorded in the County Clerk's office Cass County Texas, in deed record N "2" page 177; 320 acres, John Lick, deeded from George B. Thaggard to the Jefferson Lumber Company, April 2nd 1890, recorded in Clerks office Cass County, Texas, in deed record M "2" page 271.

Also 600 acres Wm. Donahoe survey deeded from W. P. Cornelius et al. to the Jefferson Lumber Company May 23rd, 1890, recorded in Deed Record book P "2" page 538. All of said tracts of land situated in Cass County, Texas, about 8 miles west from Atlanta.

Also open timber on the following described tracts of land situated in Cass County, Texas:

320	Acres	T. J. Foster Head-right survey.	
160	"	N. J. Wilson Pre-emtion	"
212	"	Dison Dyer H. R.	"
160	"	Conal Lemons	"
100	"	William Wilson	"
72	"	K. A. Welborn	"
100	"	M. D. Frazier	"
900	"	A. D. Ducan	"
174	"	R. C. Graham	"
80	"	K. A. Welborn	"
50	"	Dixon Dyer	"
140	"	J. R. Boice	"
275	"	A. Taylor and H. O. Jones	"
200	"	" "	"
553 1-2	"	K. A. Welborn	"
98	"	"	"
78 1-2	"	A. D. Duncan	"
100	"	John Leck	"

The last above described 18 tracts of land are fully described in a certain deed of Trust from the Jefferson Lumber Company to W. R. Camp, Trustee, dated July 7th, 1891, Recorded in County Clerk's office Cass County Texas in Book D. of Mortgages, pages 199 to 215 inclusive which said deed is now referred to for a more perfect description of said lands upon which said pine timber stands."

Also 440 acres of land situated in Harrison County, Texas, a portion of the Head Right survey of 440 acres of land. For a more perfect description of said 440 acres of land a refference is hereby made to a deed from C. C, Galoway, W. L. Whitaker snd Benj. Whitaker to the Jefferson Lumber Company, dated July 8th, 1885, which said deed is recorded in the County Clerk's office in Harrison County, Texas, in Deed Register No. 22, page 605. Also fractional block No. 35 in the Town of Kildare, Cass County Texas. Also ten acres situated in Marion County, Texas, a portion of the Greenleaf Perry Survey, for a more perfect description of which, a reference is

hereby made to a deed from E. W. Taylor to Whitaker & Galloway, dated December 30th, 1894, recorded in the County Clerk's office in Marion County, Texas, in Deed Register Vol. 2, pages 438 and 439. Also 798 acres of land located in Marion County, Texas, being the Dan O. Driscol bounty warant survey and patented to L. A. Johnson, assignee of the said Driscol, Jan. 30th, 1873, No. patent 404, Vol. 14; for a more perfect description of said land a reference is hereby made to said patent.

Also 100 acres of land situated in Marion County, Texas, as a portion of the Greenleaf Perry H. R. survey; for a more perfect description, see deed from Whitaker & Galloway, to the Jefferson Lumber Company. Comprising all the property formerly owned by the Jefferson Lumber Company and sold to W. B. Ward, W. B. Chew, John M. Bemis and Elijah Robinson by O'Neal and Allday, Commissioners, except the lumber and stock of merchandise.

To have and to hold unto the said L. S. Schluter, trustee, as aforesaid, his successor and substitute forever all the foregoing and above described property and premises, together with all and singular the rights, members and appurtenances thereunto belonging, free from ourselves, the said Kildare Lumber Company and all other persons lawfully claiming the same, or any part thereof.

This conveyance ,however, is intended as a trust for the following purposes, to wit:

Whereas, the said Kildare Lumber Company is justly indebted to W. B. Ward of Marion County, Texas, in the sum of thirty-nine thousand six hundred three and 13-100 dollars ($39,603.13) as evidenced by certain promissory notes of even date herewith, each bearing interest at the rate of six per cent. per annum from date, and for the sums and payable as follows, to-wit:

Four notes, each for the sum of $4555.39, payable on the 13th, 16th, 19th and 22nd days of Oct., 1892,

respectively.

One note for the sum of $750.00 payable three months after date.

One note for the sum of $2500.00 payable four months after date.

And whereas the said Kildare Lumber Company is justly indebted to John M. Bemis in the sum of $2,500.00, payable four months after date.

And whereas the said Kildare Lumber Company is justly indebted to John M. Bemis in the full sum of three thousand two hundred and fifty ($3,250.00 as evidenced by two certain promissory notes each of even date with these presents and each bearing interest at the rate of 6 per cent. per annum from date and for the sums and payable as follows, to-wit: One note for the sum of $1,250.00 payable three months after date. One note for the sum of $2000.00 payable four months after date. And whereas, the said Kildare Lumber Company is justly indebted to Elijah Robinson in to-wit: the full sum of thirty thousand one hundred forty-eight and 78-100 dollars ($30,-148.78) as evidenced by three certain promissory notes each of even date herewith and each bearing interest at the rate of six per cent. per annum from date and payable and for sums as follows, to-wit: Two notes each for $10,039.59, payable six and twelve months after date respectively; one note for the sum of $10,039.60, payable 18 months after date. And whereas, the said Kildare Lumber Company is also justly indebted to W. B. Chew in to-wit: The full sum of three thousand two hundred and fifty dollars ($3,250.00) as evidenced by a certain promissory note of even date here with, payable thirty days after date with interest at the rate of eight per cent. per annum, after maturity, each and all of said notes being payable to the parties as named or bearer.

And this deed of trust is given for the better security and enforcement of the payment of said indebtedness.

Now, if the said Kildare Lumber Company shall well and truly pay off and discharge the above described indebtedness (or cause the same to be done) at the maturity thereof, together with the interest thereon accrued, then this conveyance shall be null and void, but in case of default on the part of the said Kildare Lumber Company, to meet and promptly pay off the above described notes, or either of them, or any part thereof, at the maturity of the same, together with interest thereon accrued, then, in that event, the said L. S. Schluter is hereby authorized, empowered and it is made his duty to immediately, on the request of the said parties holding the above described indebtedness, or either of them or their assigns, to enter upon and take possesion of all the above described property and proceed to sell the same to the highest bidder for cash, at the Court House door in the city of Jefferson, Texas, after giving due notice of the time and place of such sale for twenty days, by posting notices thereof at three different places in Marion County, one of which shall be at the Court House door of said county. 'To make good and sufficient title, deeds and conveyances to the purchaser or purchasers of said property and to appropriate the proceeds of such sale; first, to the payment of the expenses of executing this trust, including a commission of three per cent. to the said trustee for his said services in the execution thereof then applying the residue of said proceeds of such sale to the payment of the above and foregoing described notes and accrued interest, or such of them as shall remain unpaid, without reference to the order in which they appear herein, holding the residue after the payment of the expensese of executing this trust and payment of such sums as may be due on the above described note,, subject to the order of the said Kildare Lumber Company.

And it is further expressly agreed and understood that should the said L. S. Schluter from any cause,

fail, refuse or be unable to act in the execution of this trust as hereinbefore provided, then in such event, the said Ward, Chew. Robinson and Bemis, or the persons holding said indebtedness or such of it as then remains unpaid, or a majority of such persons, may substitute some other person in the place and stead of the said Schluter, trustee, in writing, who shall proceed to exeucte this trust as fully and completely as the said Schluter could do under the terms hereof.

And we, the said Kildare Lumber Company, do hereby ratify and confirm any and all acts of the said trustee or his substitute by him or them lawfully done in the premises.

In testimony whereof the said Kildare Lumber Company has hereinto set its corporate name by and through its President this the 13th day of July, 1892. The interlineations in pen and ink and changes of figures as to the amount of notes to Elijah Robinson all made before signing.

KILDARE LUMBER COMPANY.
By W. B. Ward, Prs't.

The State of Texas }
County of Marion } Before me Lee Sherrill, a Notary Public in and for Marion County, on this day personally appeared W. B. Ward President of the Kildare Lumber Company, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purpose and consideration therein expresed.

Given under my hand and seal of office
(SEAL) this the 13th, day of July A. D. 1892.

LEE SHERRELL,
Notary Public, Marion County Texas.

Filed for record July 15th, 1892, at 11 o'clock A. M. Recorded July 22nd, 1892 at 3'oclock P. M.

W. F. JONES,
Clerk.

The State of Texas, }
County of Marion. } I, W. F. Jones, Clerk of the County Court in and for Marion County, Texas, do hereby certify that the above and foregoing deed of trust exeeuted by the Kildare Lumber Company to L. S. Schluter, as trustee, is a true and correct copy of the original as appears of record, in my office, in Records of Deeds of Trusts Book "G," pages 35 to 45.

Given under my hand and seal of office at
(SEAL) Jefferson, Texas, this 6th day of June, 1893.

W. F. JONES.

Clerk County Court, Marion County, Texas.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. Kildare Lumber Company, et. al. Kildare Lumber Company to L. S. Schluter, Trustee. Deed of trust. Certified copy issued June 6th, 1893. W. F. Jones, Clerk. Depositions in the case for complainant. Filed August 25th, 1894. C. Dart, Clerk. By W. E. Singleton, Deputy.

In the Circuit Court of the United States for the Eastern District of Texas, at Jefferson,
In Chancery.

National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Co., et. al. } Chy. No. 38.

TESTIMONY TAKEN IN BEHALF OF THE DEFENDANTS.

By agreement of the parties, Lewis S. Schluter, witness for the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Todd, counsel for the defendant, Kildare Lumber Company:

My name is Lewis S Schluter, I reside in Jefferson, Marion County, Texas, and have lived here principally

during the last forty-three years. I am the L. S. Schluter, named as trustee in a certain deed of trust executed about the 13th day of July, 1892, by the Kildare Lumber Company, to secure, among other indebtedness, the notes herein sued on by plaintiff. I am, by profession, an attorney at law. I was connected with Elijah Robinson of Kansas City, Mo., and J. H. Culberson of Jefferson, Texas, as attorney for the National Bank of Commerce in certain suits, in the United States Circuit Court at Jefferson, which had been reduced to judgment, but unsatisfied at the time of the execution of the deed of trust above mentioned. I wrote the deed of trust at the instance of all the parties interested, and I represented Mr. Robinson as agent and attorney, in fact in the conveyance of certain property to the Kildare Lumber Company.

Mr. Robinson left Jefferson prior to the 11th day of July, 1892, after the agreement or arrangement for the organization of the Kildare Lumber Company had been agreed upon by the parties, but before all the necessary conveyances had been executed and the transactions fully consummated, but what remained to be done, was the execution of releases by creditors of the Jefferson Lumber Company, who claimed liens by virtue of a former deed of trust, made by the Jefferson Lumber Company to W. R. Camp, trustee, and the conveying of the property by the purchasers, at the Receiver's sale to the Kildare Lumber Company. Mr. Robinson was one of these purchases, and constituted me as attorney, in fact, for the purpose of conveying his interest in the property to the Kildare Lumber Company.

I was also authorized by Mr. Robinson to receive the notes and stock executed by the Kildare Lumber Company, when such conveyance was made. I did execute a conveyance to the Kildare Lumber Company and did receive the notes of the Kildare Lumber Company, notes aggregating, in round figures, about

$30,000, and the stock of the Kildare Lumber Company to the amount of $39,000, which notes and stock I transmitted to Mr. Robinson at Kansas City.

The conveyance was, I think, made on the 13th day of July and the notes and stock executed and delivered to me on the 13th day of July, 1892.

Q. On the execution and delivery to you of the notes and stock above mentioned, and their receipt by you, did you not sign and deliver to Mr. C. F. Bemis this paper which I hand to you for inspection?

A. No sir, I did not.

Q. Did you not sign and deliver the paper to Mr. C. F. Bemis?

A. I did some time within ten days or two weeks afterwards; don't remember the exact date. (Witness identifies the paper, and the same is hereto attached as an exhibit, and marked "A")

Q. Did Mr. Robinson return to Jefferson after the 11th day of July, 1892, and if so, when?

A. He did not for some time.

Q. Were you not in communication and correspondence with him, and did such correspondence continue after that?

A. I had some correspondence with him. Received one letter from him dated July 11th, and one August 1st.

Q. Mr. Schluter, we will request you to produce the letter of July 11th, 1892 and from Mr. Robinson to Messrs. Schluter and Culberson enclosing the power of attorney to which you have referred (witness produces letter) and says, yes, I have such a letter.

Q. I will ask you to permit us to mark and attach this letter to your depositions as an exhibit?

A. This letter is directed to Mr. Culberson and myself jointly relating to matters in which we are interested, and personally I have no objection to attaching it to my depositions, but it is a private letter, and Mr. Robinson not being present, I believe I will not.

Here Mr. Culberson interposed an objection to at-

taching the letter on the ground that it was privileged communication between Client and Attorney. (Here attach that part of the letter which is typewritten, which is all of the said letter excepting Post Script which is written, exception being withdrawn to that extent marked exhibit B. witness refused to attach letter without permission of Robinson.)

Q. When did you first become connected or acquainted with the proposition about reorganizing the Kildare Lumber Company?

A. About May 3rd when the property was sold by O'Neal and Allday, Commissioners under the order of the District Court of Marion County.

Q. Was Mr. Robinson here at the time of that sale?

A. He was. The property at that sale was purchased by Messrs. Robinson, W. B. Chew, W. B. Ward and J. M. Bemis.

Q. Did you know anything of any agreement between those parties with reference to that purchase?

A. No sir, I cannot say that I do; was not present at the agreement.

Q. Were you not present when Ward, Bemis, Robinson and Chew or any of them discussed among themselves the proposed agreement for the purchase of the property

A. I was not present when the property was sold and did not hear any agreement among them at that time.

Q. When did you first hear any discussion of the terms and considerations of that purchase?

A. I first heard the matter discussed in a general way in the office of the Jefferson Lumber Company about the 7th or 8th, 1892.

Q. Who was present when the matter was talked about in your presence at that time?

A. There was present Mr. Robinson, J. H. Bemis M. L. Crawford, W. B. Ward, T. J. Rogers and myself and others.

Q. In that talk do you remember what appeared to be the understanding between those parties as to how the property should be purchased and how paid for, and what disposition should be made of it?

A. My understanding was, that Mr. Robinson represented the claim of the National Bank of Commerce, of Kansas City, and Mr. W. B. Ward, as president of and representing the National Bank of Jefferson, were each to take notes for about 40 per cent. of their claim against the Jefferson Lumber Company, and J. H. Bemis & Company, and the remaining 60 per cent. in stock in the new company to be known as the Kildare Lumber Company. The notes were the notes of the Kildare Lumber Company. Mr. Chew to take one note in settlement of his claim, and John M. Bemis was to get $3,250, and for the remainder of his debt he was to get stock in the Kildare Lumber Company.

Q. Mr. Schluter, will you produce a letter written by Mr. Elijah Robinson to yourself and Mr. Culberson stating the substance of that agreement dated July 12th, 1892. (Witness produces letter.)

A. The letter demanded is a letter both to myself and Mr. Culberson relative to a matter of business in which we are both interested and simply instructions to me as to what to do in the matter and Mr. Robinson not being present, the witness declines to attach the letter. (Both letters admitted by the court and attached, marked Exhibit D.)

Q. Was not this letter, although addressed to you and Mr. Culberson jointly, really intended for your personal guidance and instruction in the matters which Mr. Robinson left in your charge when he left Jefferson?

A. I so regard it.

Q. Mr. Schluter, recurring to the receipt of the paper signed by you and delivered to C. F. Bemis, to which heretofore your attention has been called and which has been attached, please state how you came to sign that paper as attorney for the National Bank of Commerce, and by virtue of what

authority or employment did you sign the same?

A. I signed the paper referred to at the request of C. F. Bemis some ten days or two weeks, don't remember just how long, but know it was some days after the execution of the deed of trust from the Kildare Lumber Company to myself as trustee, previous to which time Mr. Robinson and Mr. Culberson and myself were connected with the suits of the National Bank of Commerce, against Jefferson Lumber Compay and J. H. Bemis & Co., in the Federal Court at this place.

My employment was, in fact, through Mr. Elijah Robinson. The suits above referred to at this time had been reduced to judgment, and the judgments were still unsatisfied. Mr. Robinson employed myself and Mr. Culberson to assist him in the prosecution of said suits, which we did.

After the organization of the Kildare Lumber Company and some ten days or two weeks thereafter, I can't say positively how long, but some days at least, Mr. C. F. Bemis came to my office with the paper to which my attention has been called, and asked me to sign an agreement to turn that paper over saying that was the understanding between his father and Mr. Robinson. I told him that I did not know whether I had authority to sign such a paper or not, but that it was my understanding that the paper was to be turned over. How I got that impression I do not know. He again assured me that such was the agreement between Robinson and his father, and that it would be all right. I asked him with respect to the paper, whether it was the same paper involved in the Federal Court here, as that was the only paper I had any connection with, and those cases had been prosecuted to final judgment. He assured me it was, and acting upon his assurance and representations, and what I believed to be the understanding between the parties, I signed the paper, and about the same time imme-

diately I think, I wrote to Mr Robinson informing either of having signed said paper or that Mr Bemis was claiming the paper, and asking his ratification of what I had done. Subsequently I learned that the paper. note, bills, referred to in the paper signed by me, covered a large amount and named numerous pieces which I had never seen or had connection with, and whch were not embraced in the suits in the Federal Court here.

Q. Did Mr. C. F. Bemis claim to be acting for his father in making that request?

A. I presume that he was.

Q. Mr. Schluter, to refresh your memory, did you get an impression that this paper or papers which had been placed in your charge was to be surrendered from conversation that you had, or heard, with Robinson, Ward, Bemis and others to which you have already referred ?

A. I have been trying to remember how I formed the impression inquired about, and I am now clearly of the opinion that it was formed in consequence of a conversation or conversations between Mr. Robinson and the other parties relative to some claims which he, Robinson, thought had been paid. The substance of the conversation with Robinson being as follows: That upon his return home should he find that this particular piece of paper, or some of it, had been paid, having reference especially to some partictular piece or pieces of paper, that he would allow such sums as had been paid as a credit on the paper which he was to receive from the Kildare Lumber Company. That belief was strengthened by marginal memorandum on a letter I have from him dated July 11th, 1892, wherein he advises me that on his return home he found that the claim of $1834.84, acceptance of the Southern Pine Lumber Compauy, had been paid, and authorized me to deduct the amount from the amount of his notes from the Kildare Lumber Company. In accordance with that direction I entered

credit to that amount on the back of one of the notes, at least Mr. Bemis did in my presence.

Q. Before Mr. Robinson left here, when he was so anxious to leave Jefferson, is it not a fact that you were expressly called into the presence of himself, Mr. Bemis, Mr. Ward, and perhaps Mr. Chew and Mr. Rogers, parties interested in this transaction and if the whole transaction and purport of it was not then explained to you for the purpose of facilitating you in completing it when Mr. Robinson left?

A. I have no recollection of having been called for such a purpose.

Q. Did Mr. Robinson explain to you then before he left what his understanding of the agreement was between the parties?

A. I think he talked about it in a general way, but I don't think he went into details. His instructions in the matter were through communication after he got home.

Q. Mr. Schluter, please examine that telegram, and state if it was not sent after you received the letter from Mr. Robinson of July 11th and in reference to that letter?

A. I think perhaps it was.

(Copy of the telegram signed by W. B. Ward, L. S. Schluter and J. H. Bemis to Elijah Robinson, dated July 13th, 1892, attached hereto as an exhibit marked "B")

Q. Please attach to your deposition a full list of the papers which were in your hands for the Bank of Commerce, upon suits instituted in the Federal Court at Jefferson, to which you have heretofore referred. (list herto attached and marked Exhibit "C."

Cross Examination, by J. H. Culberson, Attorney for plaintiff.

Q. Your employment in this matter for Robinson was a general employment to look after the suits which

had been instituted in the Federal Court at Jefferson, was it not?

A. It was.

Q. In the matters of the negotiation of the sale and organization of the Jefferson Lumber Company's property, and the organization of the Kildare Lumber Company, we were not employed, were we?

A. No sir.

Q. What paper did you refer to in this written agreement which you gave to C. F. Bemis?

A. The paper in suit in the Federal Court at this place.

Q. Had you ever heard before that this paper was to be returned to any body?

A. I cannot say that I did. I only had an impression that it was to be returned as already explained in my direct testimony.

Q. Was it not represented by C. F. Bemis, that that was the agreement between his father and Mr. Robinson. that you signed the paper?

A. If it had been otherwise, I would not have signed it.

Q. Did you ever have any talk with Mr. Robinson about the claim that Mr. Bemis was making for the paper?

A. I did.

Q. How long after you signed that agreement did you notify Mr. Robinson that it was an agreement to return the paper?

A. I think that I wrote him immediately after signing the paper. I received a letter from Mr. Robinson, dated August 1st, 1892, in which he says, as follows:

"I would have answered your letter of the 15th inst. sooner, but I left home the day it was received and was gone several days."

The letter then speaks of the stock and notes that had been issued, and states that he regrets they were issued before his letter of July 11th was received, and further states that there was no agreement whatever that I should assign our claims, or any of them, to anybody; that no such thing was ever intimated by Mr. Bemis or any one else. I think I sent him the stock and notes on 15th of July, and that I wrote him later in July, say about 20th to 25th, about the claims of Bemis, but am not sure of this

Y. What did you do about the paper you agreed to deliver?

A. I carried it to Mr. Bemis, telling him that that was the only paper I had any information of, and that he could get it, and I would turn it over to him, and asked him to join me in an application to the Court to withdraw it from the file. Mr. Robinson did not give me permission to tender the paper to Mr. Bemis that was sued upon. I tendered Mr. Bemis the paper that was sued on in the Federal Court, and he declined to accept, unless he could get all the papers called for in the list signed by me attached to my answer, some of which I had never seen, nor had any connection with whatever.

L. S. SCHLUTER.

Sworn to and subscribed before me, this the 27th day of September, A. D., 1894.

J. A. ARMISTEAD,

Justice of the Peace and Ex-Officio Notary Public, Marion County, Texas.

EXHIBIT "A."

JEFFERSON LUMBER COMPANY.

In Account with HARDY A. O'NEAL, Receiver.

NATIONAL BANK OF COMMERCE,

KANSAS CITY, MO., July 8th, 1892.

				Credits.
Demand Draft J. H. Bemis & Co.. on Jefferson Lumber Co., Due 6-22, '91				$7,500.00
Grigsby Bros	Due on	June	21st, 1891.	2,122.60
Bowie Lumber Co.	"	"	27th, "	1,500.00
South West Lumber Co.	"	"	July 3rd, "	1,417.96
R. A. Handy	"	"	8th, "	2,536.89
L. K. Morris	"	"	9th, "	1,901.17
Whitaker & Garret L. Co	"	"	17th, "	2,710.17
Blount & Co	"	"	12th, "	1,423.10
Colorado Springs L. Co.	"	"	16th, "	2,677.25
H. C. Tunkin & Co	"	"	17th, "	2,476.82
W. L, Whitaker	"	"	17th, "	2,376.94
Houston & Noel	"	"	29th, "	2,093.64
D. A. Salley & Co.	"	"	21st, "	1,837.41
T. L. L. Temple	"	"	27th, "	2,785.00
Whitaker & Garret L. Co.	"	"	23rd, "	1,850.00
Whitney & Co.	"	"	Aug. 3rd, "	1,733.86
Paul Smith	"	"	3rd, "	1,869.48
H. C. Tunken & Co.	"	"	3rd, "	3,221.80
Campbell, Fisher & Co	"	"	4th, "	2,318.43
Alexander & Noel	"	"	8th, "	1,527.71
Brown Co. L. Co.	"	"	11th, "	1,937.74
Grigsby Bros	"	"	13th, "	1,694.75
Campbell, Fish & Co	"	"	13th, "	1,964.75
Kensington L. Co	"	"	16th, "	1,707.29
Houston & Noel.	"	"	24th, "	2,115.16
D. A. Salley & Co	"	"	27th, "	2,319.40
Blount & Co.	"	"	Sept. 6th, "	1,950.75
Interest to date				4,793.26
Protest fees				89.14
Add Cash Advanced				3,250.00
				$68,662 13

Stock of K. L. Co.	$3,9161.
Notes 7-13 6 Mo. 6 per cent.	10,049.59.
Notes 7-13 12 Mo. 6 per cent.	10,049.59.
Notes 7-13 18 Mo. 6 per cent	10,049.59.
	$69310.14.

All the above claims to be delivered, assigned and

surrendered, and in the event any of it should not be so surrendered then the amount of such as shall not be surrendered or assigned to be placed as a credit upon the stock issued to C. J. White and the notes made to Elijah Robinson, all of Kildare Lumber Company, July 13th, 1892, without expense to Bemis.

L. S. SCHLUTER,
Attorney for National Bank of Commerce.

EXHIBIT "B."

Jefferson, July 13th, 1892.

ELIJAH ROBINSON:
Kansas City, Mo.,

Releases are lacking from Milton National and Atlanta. No stock to be issued except to those who release. Agreement did not contemplate all releases being executed before organization. By-laws you send show this. Benjamin Whitaker preferred under name Southern Pine Lumber Company, and is not the person you refer to. You must modify instructions about releases. Wire answer.

W. B. WARD,
L. S. SCHLUTER,
J. H. BEMIS.

EXHIBIT "C."

List of claims embraced in the suits of the National Bank of Commerce of Kansas City, Mo. vs J. H. Bemis & Co., et al, in the United States Circuit Court at Jefferson.

One draft dated at Kansas City, Mo., March 31st, 1891, for the sum of $1,869.00 drawn by J. H. Bemis and Co., and upon Paul Smith.

One draft, dated at Jefferson, Texas, April 24th 1881, for the sum of $2,319.40 drawn by Jefferson Lumber Company, and upon D. A. Salley & Co.

One draft dated at Jefferson, Texas, April 2, 1891, for the sum of $2,221.80, drawn by Jefferson Lumber Company and upon H. C. Tunkin & Company.

One draft, dated at Jefferson, Texas, April 21st, 1891, for the sum of $2,115.16, drawn by Jefferson Lumber Company, and upon Houston & Noel.

One draft dated at Jefferson, Texas, April 9th, 1891, for the sum of $1,423.10 drawn by J. H. Bemis and upon Blount & Company.

One draft dated at Kansas City, Mo., March 6th, 1891, for the sum of $1,901.17, drawn by J. H. Bemis & Company, and upon L. K. Morris.

One draft dated at Kansas City, Mo., March 13th, 1893, for the sum of $2,627.23, drawn by J. H. Bemis & Company, and upon the Colorado Springs Lumber Company.

One draft dated at Kansas City, Mo., March 5th, 1891, for the sum of $2,536.89, drawn by J. H. Bemis & Company, and upon R. A. Handy.

One draft dated at Kansas City, Mo., March 18th, 1891, for the sum of $1,837.41, drawn by J. H. Bemis & Co., and upon D. A. Salley & Co.

One draft dated at Kansas City, Mo., March 14th, 1891, for the sum of $2,476.82, drawn by J. H. Bemis & Co., and upon H. C. Tunkin & Co.

One draft dated at Kansas City, Mo., March 10th, 1891, for the sum of $2,093 84, drawn by J. H. Bemis & Co., and upon Houston & Noel.

One draft dated at Kansas City, Mo., for the sum of $7,500.00, drawn by J. H. Bemis & Co , and upon the Jefferson Lumber Company.

EXHIBIT "D."

July 12th, 1892.

MESSRS. SCHLUTER & CULBERSON,
Jefferson, Texas.

Gentlemen:

I wrote you yesterday, and although my communication was doubtless long enough to tire you, it was dictated hurriedly and in the midst of an accumulation of other business, and it was probably not as clear as it should have been. Since writing it

has occurred to me that matters may be very much simplified by basing everything on the calculation made up to July 9th, 1892, and bear interest from date.

If that be done, you can have the notes which the corporation is to execute to Ward, Bemis and Bank of Commerce, dated July 9th, 1892, and bear interest from date.

In that event, you should insert after the word "semi-annually" in the third line of the 5th page of the draft of proceedings of the Board of Directors, the following: "All of said notes to be dated July 9th, 1892."

Taking that as a basis, the amounts will be as follows:

Consideration for purchase of interest of Ward, Bemis, Chew and myself	$169,463.98
Notes to John M. Bemis	3,272.05
Two notes to W. B. Ward, each for	18,221.56
Three notes to National Bank of Commerce, each for	9,798.35
Notes to W. B. Chew (if he will take it)	3,272.05
To D. J. White, 381 6-10 shares of stock	38,160.00
To Elijah Robinson, 10 shares of stock	1,000.00
To W. B. Ward, 549 64-100 shares of stock	54,664.69
To London Bank 110 43-100 shares of stocks	11,043.20
To Atlanta Bank, 82 29-100 shares of stock	8,229.76
To Marshall National Bank, 39 2-10 shares of stock	3,920.00
To A. Weinstein, 69 9-100 shares of stock	6,909.25
To Sulphur Lumber Company, 101 69-100 shares of stock	10,624.32
To T. J. Rogers, assignee of Citizens Bank, 109 24-100 shares stock	10,169.50
To W. B. W. ass. J. B. Alexander, 486	

shares stock 48,600.00
To Grigsby Bros. 226 9-10 shares of stock 22,690.30
To Erastus Jones, 378 shares of stock 37,800.00
To John M. Bemis, 288 77-100 shares of stock 28,877.04

In this list I have left out the stock to Mr. Whitaker, for the reason stated in the P. S. to my letter of yesterday.

The $169,463.98 constituting the consideration for the conveyance by Ward, Bemis, Chew and myself to the Kildare Lumber Company is made up of the following items, namely: The amount of claim due Ward and the Jefferson Bank and interest thereon, $71,107-33; the amount paid the receiver by Ward and interest thereon $3,272.05; the amount of claims due the National Bank of Commerce and interest thereon $65,-672.25, the amount paid the receiver by the National Bank of Commerce, $3,272.05; the amount paid the receiver by John M. Bemis, $3,272.05, and the amount paid the receiver by W. B. Chew and interest thereon, $3,272.05, making a total of $169,463,98. In this calculation the interest is counted up on all the claims to July 9th.

In the draft of proceedings of the Board of Directors sent you yesterday, on page 5, I wrote your name L. C. instead of L. S. Schluter. In the second paragraph, from the bottom of the page, the words "as hereinafter provided" should be "as hereinbefore provided."

I stated in my letter yesterday that I enclosed form of note having omitted it, I send it herewith.

Yours Truly,
ELIJAH ROBINSON.

Hope you will have no trouble in having the whole matter fixed up.

P. S:—Since writing the above I have examined the deed of trust from Jefferson Lumber Company to Camp and I find Whitaker is not secured for any amount. I understood Whitaker owed Bemis instead

of Bemis owing him and I must therefore insist that these items of stock be left out. By the deed of trust the Southern National Bank, of N. Y. is secured for $6,000. and the First National Bank, of Milton, Pa., is secured for $4,332.95. My agreement was that stock should be issued to holders of claims secured by that deed of trust up to $185,000.00. That is, we put in $185,000.00 as the amount. I think that some of these claims are stated twice, and that the account doubles in the statement given me of the stock it is proposed to be issued. I would have called J. H. Bemis' attention to this at the time, but in the haste did not observe it. I will not now object on account of some of these claims must come out.

Mr. Bemis and I first agreed on basis of settlement; we figured on stock and preferred claims amounting to $300,000, but he kept getting in one thing and then another until the stock and preferred claims now run up to form $300,000 to $370,000.00.

July 11, 1892.

Messrs. Schluter & Culberson,

Jefferson, Texas.

Gentlemen—I send you herewith power of attorney authorizing you to convey in my name to the Kildare Lumber Company all my interest in the property and effects conveyed by the receiver of the Jefferson Lumber Company to Ward, Chew, John M. Bemis and myself. This conveyance is to be made when the receiver's deed in proper form is executed and delivered to us, and when the parties secured by the deed of trust executed to Camp for the benefit of certain creditors, shall have executed releases to the Kildare Lumber Company, and when Mr. Ward and John M. Bemis shall have reconveyed to the Kildare Lumber Company the land conveyed to them by the Jefferson Lumber Company, and when Mr. Ward shall have executed a bill of sale to the Kildare Lumber Company for the lumber and other personal property conveyed

to him by the Jefferson Lumber Company.

Now you will please bear in mind that this conveyance is not to be made by you as attorney in fact until these other conveyances and releases are ready to be delivered also. These parties secured by the deed of trust to Camp are as follows: Linden Bank, Atlanta Bank, Marshall National Bank, A. Weinstein, Benj. Whitaker, Sulphur Lumber Company, T. J. Rogers, assignee of the Citizens Bank, W. B. Ward, assignee of J. B. Alexander, Grigsby Bros., Erastus Jones and John M. Bemis. There is probably some question about the ability of Mr. Rogers as assignee, making a release for the Citizens Bank. If he should refuse to do so, you need not let that fact stand in the way of making that conveyance as my attorney in fact but in that event no stock must be issued to him as assignee of the Citizens Bank. As to the others, you must insist on releases being made by them before delivering the conveyance. As attorney of the Kildare Lumber Company, have it execute and deliver to us the notes and stock which we are to get in payment of our claim, as follows: The National Bank of Commerce of Kansas City, Mo., three notes, each for the sum of $9793.35 plus interest on said amount at six per cent from July 9th. to the date of the execution of the notes; these notes to be secured by deed of trusts on all the property of the Kildare Lumber Company except the stock of lumber on hand. To C. J. White, stock in the Kildare Lumber Company to the amount of $38169, which will be 381 6-10 shares, and to Elijah Robinson, stock to the amount of $1000.00, which will be ten shares. The amount due the National Bank of Commerce is $68,540 up to July 9th 1892. The amount is made up as follows: The acceptances upon which Mr. Bemis and myself calculated up to July 9th making a total of $67.246.97, less the acceptance of the Southern Pine Lumber Company and interest thereon. (Acceptance $1834,84 plus interest $138,60 plus protest fees $4.58, $1979-

02.) leaving the amount of the acceptance and the interest thereon and the protest fees figured myself and Mr. Bemis $65.267.95, 40 per cent of this amount is $26,107.95, and to this add the $1250 paid the receiver May 4th and interest thereon to July 9th $18.05 and the $2000,00 for which you drew in favor of the receiver and interest thereon to July 9th. $4, making $3282.05. This added to 40 per cent of the total acceptances, interest, etc., makes $29380, one third of which is $9703.35. Please have the note executed after a form which I inclose herewith, and you will also please see that the deed of trust is in proper form and properly executed and that it gives no preference over any of the claims by it secured. This deed of trust is to secure our forty per cent of the amount we paid the receiver Mr Ward's 40 per cent and the amount paid the receiver, and the amount paid the receiver by John M. Bemis, but it is to be stated in the deed of trust that so far as the security is concerned all these notes are on an equal footing regardless of when they become due.

I send you herewith, a copy of what I think should be spread upon the records of the company at the first meeting of the Board of Directors. You will please call the attention of Mr. Bemis and Mr. Ward to some slight changes which I have made in the draft of the by-laws, that is, I have made slight changes from the one drawn by me while at Jefferson. I don't think that either of them will make any objection to the changes, because they are such as should have been made and such as escaped my attention in the haste of drafting them while at Jefferson; anyway you must insist on adopting them substantially as I have sent them, and they must be recorded in the records by the secretary. You will see that I left blanks for names dates, etc. I think that you had better insist on either A. H. Schluter or T. J. Rogers being made vice-president. I don't see that anybody could object to this. I had and understanding with Mr Bemis and

Mr. Ward that some one of the directors named in the charter should resign and I be elected to fill the vacancy. You will see that I have provided for this in the proceedings of the first meeting of the board. I think that either H.E.Bemis or W.B.Ward,Jr. should be the man to resign. I understand that Mr. Bemis expects either H. E. Bemis or W. B. Ward, Jr. to be the secretary of the company. It seems to me that the man who is elected secretary might resign from the board of directors. It is not necessary that the secretary should be a member of the board. You will see in the resolutions which I have prepared, and which is to be entered on the records of the company, providing for the execution of the notes and the issue of the stock in payment of the claims due the National Bank of Commerce and other parties, the amounts are left blank. These amounts are to be filled in after you have calculated the interest from July 9th to the date the resolution is adopted by the board of directors. That is true of all the claims. My understanding is that the claims of Mr. Ward amount to $91,109.32, and the claims of the other parties who are to receive stock for the same are as follows: Linden Bank $11,043,23; Atlanta Bank, $8,229.26; Marshall National Bank, $3,920; A. Weinstein, $6,909.28; Benj. Whitaker,$13,341.40; Sulphur Lumber Company, $10,169.50; Citizens Bank, $10,-624.32; W. B. Ward, assignee of J. B. Alexander, $48,600; Grigsby Bros., $22,690.80; Erastus Jones, $37800; John M. Bemis, $28887.04.

If you know of anything which belonged to the Jefferson Lumber Company prior to the failure and is not mentioned in this letter, you will please see that that is also conveyed or released to the Kildare Lumber Company. The Kildare Lumber Company is entitled to everything that the Jefferson Lumber Company had; lands, timber, railroads, mills, machinery, horses, mules, cattle, wagons, etc., merchandise, lumber, bills receivable, in fact everything and inasmuch as you

are on the ground and in a position to know about these things I wish you would be particular to see that the new corporation gets title to everything that the old corporation had.

In the formation of this new corporation and the arrangement for the stock, Mr. Bemis has rung in on me claims which I did not expect, such for instance as Whitaker and others, and I am therefore to insist on everything. After having consummated the arrangement, I would be glad if you would write me in detail just what has been done and return to me the draft of the by-laws and proceedings of the Board, with amounts, dates, etc., inserted just as it had been placed on the record.

With kind regards, yours truly,

ELIJAH ROBINSON.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo. vs. The Kildare Lumber Company et al. Letters filed October 2, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company et al.

Testimony of L. S. Schluter for and in behalf of defendant. Filed September 27th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

U. S. Court at Jefferson.

National Bank of Commerce
vs.
Kildare Lumber Co., et al. } Chy. No. 38.

You will take notice that five days after service hereof we shall apply to the Clerk of the U. S. Circuit Court in and for the Eastern District of Texas, at Jefferson, for a commission to take the depositions of W. B. Ward, who is temporarily residing at Mount Eagle, Grundy County, Tennessee, in answer to the

following interrogatories to be read in evidence on the trial hereof in behalf of the defendants.

To the National Bank of Commerce, or J. H. Culberson, its ittorney of record.

ARMISTEAD & PRENDERGAST,
Attorneys for Defendants.

Interrogatories to be propounded to W. B. Ward, a witness for the defendant.

1st, Were you present on or about May 3rd, 1892, when an agreement was made between Elijah Robinson, J. M. Bemis, W. B. Chew and yourself, relative to the purchase of the Jefferson Lumber Company property then about to be sold by an order of Court; if so, state specifically what agreement was made and who were the parties to the agreement?

2nd. What was the consideration that each person was to pay to become a party to that agreement?

3rd. What was to become of the obligations held by each party against the Jefferson Lumber Company or against J. H. Bemis & Co., when the Kildare Lumber Company was organized?

4th. When was the Kildare Lumber Company organized, and what obligations against the Jefferson Lumber Company and J. H. Bemis & Co., did you own or control or represent; state the amount as near as you can, and state from whom or where we can get the exact amount?

5th. Did you, on or about May 3rd, 1892, or about July 13th, 1893, have any conversation with Elijah Robinson about whether there was a contract that you and the National Bank of Commerce of Kansas City, should surrender to any person the obligations they held against the Jefferson Lumber Company or J. H. Bemis & Co.; if so, to whom were they to be surrendered, and when?

6th. What did you give for your interest in the new Company. Did you give any more than one-fourth of the thirteen thousand dollars; if so, what was it?

7th. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in the cause, or either of them, or that may be material to the subject of this your examination to the matters in question in this cause, if yea, set forth the same fully, and at large, in your answer?

ARMISTEAD & PRENDERGAST,
Attorneys for Defendant.

We hereby accept service of the within interrogatories. August 28th, 1894.

J. H. CULBERSON,
Attorney for Plaintiff.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et. al.

Filed August 28th, 1894. C. Dart, Clerk. By W. E. Singleton, Deputy.

Court at Jefferson, Texas.

National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Co., et. al. } Chancery No. 38.

Cross interrogatories propounded to the witness W. B. Ward.

1st. X. If in answer to the 3rd interrogatory you say that there was an agreement between Robinson and Bemis and the other purchasers of the Jefferson Lumber Company property to organize a new Company, then state if it is not a fact that such agreement was in writing and signed by the parties thereto, and if yea, then state where is said agreement now, and did you keep a copy of it?

2nd. X. If you state what was done with the obligations against the said Jefferson Lumber Company and the said J. H. Bemis & Company by the parties holding the same, then state how you know what

disposition was made of the same? Did you see any of said claims surrendered and if so, to whom were they surrendered? and when were they surrendered?

3rd X. If you say that the said claims against the said Jefferson Lumber Company and the said J. H, Bemis & Company were to be surrendered, then state to whom the same were to be surrendered. And how you know this fact.

4th X. If you say that there was an agreement to surrender the claims held by the creditors of the said Jefferson Lumber Company and the said J. H. Bemis & Company but that said agreement was oral, and was not embraced in the written agreement then please explain why such oral agreement was not included in the said written agreement, and state further where the said agreement was made, who was present and what was the language employed by the parties to said agreement. State fully the conversation which passed between the parties which led to the oral agreement referred to. And state why the said oral agreement to surrender said claims was not embraced in the written agreement?

5th X. Is it not a fact that you did not surrender the claims held by you against the said Jefferson Lumber Company, and the said J. H. Bemis & Company, until after this suit was brought, and is it not a fact that you never agreed to surrender such claims at the time of the organization of the new company? And is it not a fact that you held such claims or some of them for more than a year after the organization of the new company? And do you now hold some of said claims? And did you not intervene on some of said claims in the matter of receivership of the Bowie Lumber Company, pending in the District Court of Bowie County, Texas, more than a year after the organizatio of the new company and the date of the agreement you say was made to turn over and surrender all the said claims inquired about?

ELIJAH ROBINSON & J. H. CULBERSON,
Attorneys for Plaintiff.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. the Kildare Lumber Company, et al.

Cross Interrogatories to the witness W. B. Ward. Filed September 3rd, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the Circuit Court of the United States for the Eastern District of Texas at Jefferson.

I, C. Dart, Clerk of the Circuit Court of the United States for the Eastern District of Texas at Jefferson, do hereby certify that the foregoing and attached pages of manuscript numbered in the margin of said pages (one to four), contain a flul, true and correct copy and transcript of the original interrogatories and cross interrogatories in cause Chancery No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. The Kildare Lumber Company et al., all of which appears from the records of said court now in office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit (SEAL) Court of the United States of America for the Eastern District of Texas, at Jefferson, this 4th day of September, A. D. 1894.

C. DART,
Clerk of the U. S. Circuit Court, Eastern District of Texas, at Jefferson,
by W. E. Singleton, Deputy.

In U. S. Circuit Court at Jefferson.

The United States of America }
Eastern District of Texas. }

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To any Judge or Clerk of the United State Circuit Court or District Court for the Grundy District of Tennessee or any Judge or Clerk of a Court of record having a seal or any Notary Public of the County in the State of Tennessee, GREETING:

KNOW YE:

That we, in confidence of your prudence and fidelity, have appointed you, or either of you, and by these presents do give unto you full power and authority diligently to examine W. B. Ward, now in the state of Tennessee in the town of Mont Eagle in the County of Grundy upon certain interrogatories to be propounded to him in a cause wherein the National Bank of Commerce of Kansas City, Mo., is plaintiff and the Kildare Lumber Company is defendant, now pending in the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, and therefore we command, that you at certain days and places to be appointed by you for that purpose, cause the said witness to come before you, and then and there examine him upon the said interrogatories and cross interrogatories (copies whereof are hereto annexed) on his corporal oath first taken before you upon the Holy Evangelist or in such other solemn manner as is authorized by law; and that you do take the answers of the witness to such interrogatories and reduce the same to writing, which shall be signed and sworn to by said witness; and you shall certify under your own hand and seal that the same was signed and sworn to by the said witness before you, and seal them up in an envelope, with the interrogatories and this commission, with your name across the seal, and indorse on the envelope the names of the parties to the suit and the name of the witnesses and direct the package to the Clerk of the Circuit Court of the United States for the Eastern District of Texas, Jefferson. Texas; if sent by mail, the Post Master or his deputy, mailing the same, shall indorse thereon that he received them from the hands of the officer before whom they were taken.

Witness; the Honorable Mellville W. Fuller. Chief Justice of the Supreme Court of the United States. and the seal of the Circuit Court in and for the Eastern District of Texas at Jefferson, in said District, this 4th day of September A. D. 1894,

SEAL.

and of the American Independence 118 year.

C. DART, CLERK.

Eastern District of Texas at Jefferson. By W. E. Slngleton, Deputy.

Answer 1st. I was.

2. Elijah Robinson, J. H. Bemis and myself were together adjusting the terms and conditions upon which he was to become interested in the purchase but before the adjustment was concluded the sale took place and the property was bought in by W. B. Chew for himself J. M. Bemis and myself. Elijah Robinson, after the sale was over, was allowed to come into the purchase, the conditions having been fully discussed and agreed upon between said Robinson, J. H. Bemis and myself, to the effect that Elijah Robinson, Erastus Jones, J. M. Bemis and myself and others should organize a new company to be known as the Kildare Lumber Company upon the following conditions: that W. B. Chew was to receive in cash one fourth of $13,000,00 which amount he had paid for the property, and J. M. Bemis one-fourth of $13,000,00, in a note secured by the deed of trust of the new company and Elijah Robinson and myself were to receive the same as J. M. Bemis and secured in the same manner, and further the National Bank of Jefferson by me as its representaive should release its claims of $57,000,00 which together with the interest accrued amounting to about $63,000 or $65,000. it being for lumber purchased form the Jefferson Lumber Company prior to its failure, and also about $5.000,00 merchandise and $20,000.00 claims and interest on same which was preferred in the deed of trust given by the Jefferson Lumber Company, the total amount of claims and interest amounting to between eighty and ninety thousand dollars, and was to receive in lieu therefor 40 per cent of said amount in note or notes secured by deed of trust on the entire property of the new company and 60 per cent in stock of said

Company at its par value. The said Elijah Robinson was to deliver to J. H. Bemis all claims held by the Nat. Bank of Commerce against J. H. Bemis & Co.. and the Jefferson Lumber Co., and all the interest thereon, also to cancel the judgments in the United States Court at Jefferson and release and raise all attachments against J. H. Bemis in Louisiana, and in lieu of which Robinson was to receive 40 per cent. of the entire indebtedness so released in note or notes of the Company secured by deed of trust on the entire property of the Company, and 60 per cent. of stock of said Company at its par value, and as part of this same agreement between Robinson, J. M. Bemis and myself, Erastus Jones was required to deed to the new Company sundry tracts of land that had been deeded by the Jefferson Lumber Company prior to its failure, and I was required to deed to the new Company $10,000.00 worth of land which I had purchased from the Company prior to its failure, for which Erastus Jones, nor I were to receive any compensation from the new Company. It was further agreed, and required, that Erastus Jones, Alexander and his assignee, J. M. Bemis, Grigsby Bros., Sulphur Lumber Company and, perhaps, some others, I don't now recall, should release their claim or indebtedness held by them against the Jefferson Lumber Company, and which were among the preference claims in the deed of trust made by the Jefferson Lumber Company, for which they were to receive in lieu, therefor, stock of the new Company at its par value, and it was further understood that any other parties holding claims so preferred by the Jefferson Lumber Company deed of trust could release their claim, and receive therefor stock of the new Company at par value for the amount so released.

3. I am not sure what was to become of the obligations held by each party against the Jefferson Lumber Company, whether they were to be turned over to Bemis or the new Company when cancelled, except the claims of National Bank of Commerce which it was

distinctly understood and agreed upon, were to be turned over to J. H. Bemis.

4. The Kildare Lumber Company was organized in July, 1892, I did not hold any obligation individually but represented the National Bank of Jefferson in a claim of about sixty odd thousand dollars for lumber, and about twenty thousand dollars, which was preferred in the deed of trust of the Jefferson Lumber Company. I think W. T. Atkins, Cashier, can give the desired information as to the exact amount.

5. I did have a conversation with Elijah Robinson about May, 1892, also about July 13th, 1892, when the matter was fully discussed and understood between said Robinson, J. H. Bemis, and myself, to the effect that the National Bank of Commerce should deliver all the obligations they held against the Jefferson Lumber Company, or J. H. Bemis & Company to J. H. Bemis, and that no objection was made by Mr. Robinson, except that he thought that the said Bank should not be required to account for a claim against the Southern Lumber Company. he stated that they had been at a great deal of trouble in prosecuting the claim for collection; and again. in about July, 1893, at which time Mr. Robinson was in Jefferson attempting to enforce the collection of one or two of the notes of the Kildare Lumber Company which had become due, we again discussed the matter very fully, and at length, as to his failure in complying with the agreement and understanding between him, J. H. Bemis and myself, by the Bank of Commerce refusing to deliver the claims held by them against the Jefferson Lumber Company and J. H. Bemis, they being the special consideration through and for which he had obtained the notes and the stock of the Kildare Lumber Company, and I told him, as President of the Company, that I should remit the collection of his note, until the Bank of Commerce complied with the agreement and understandiag, in reply to which he asked me, if the National Bank of Jefferson had released its

indebtedness and if Erastus Jones and myself had deeded to the Kildare Lumber Company, the lands heretofore referred to in this interrogatory. I told him yes, that the bank had signed a full release, which release I think was prepared by his attorney L. S. Schluter, his Robinson's attorney, who was representing him in the matter. I had by power of attorney from Erastus Jones which was of record conveyed the lands which we had agreed to do to the Kildare Lumber Company and said conveyances are either on record or in the hands of the Company.

I told him further that this was all done at the time we received our stock at the organization of the Company.

6. I was to pay one-fourth of $13,000.00, the purchase money as a part of the condition as was agreed upon by a written contract setting out the conditions substantially if not fully as to the basis of the organization, which contract I think was signed by W. B. Chew, J. M. Bemis, Elijah Robinson and myself.

7. Referring to the conversation in July 1893 with Robinson, he said to me during that conversation or in a letter which I had received prior to that, that while refusing to return the paper in controversy that the bank did not look to it, and was willing to execute a relinquishment against the makers of the paper but that they would hold the paper over J. H. Bemis to see that he acted fairly in regard to the Kildare Lumber Company matter, and in conversation with the president of the Bank of Commerce last summer in Chicago, he stated that his action in throwing the Kildare Lumber Company in the hands of a receiver was for the purpose of "busting" the company and thereby forcing J. H. Bemis, or some one else to take up his stock and notes that he held of the Kildare Lumber Company, and upon his being successful in disposing of said stock and notes he was willing to turn over all the claims held by the Bank of Commerce

against the Jefferson Lumber Company and J. H. Bemis & Co. as heretofore agreed upon.

W. B. WARD,

Sworn to and subscribed before me this September 8th, 1894.

E. GRAENICHER,
Notary Public.

Cross.

1. I think that it was a written agreement in writing signed by W. B. Chew, Elijah Robinson, J. M. Bemis and myself, setting out substantially the basis and conditions of the new organization. I presume it is in the hands of the company. I did not keep a copy of it.

2. I am not positive that I saw any of the claims surrendered. I think that I signed the release for J. B. Alexander, assignee, and also for the National Bank, of Jefferson—I am sure that I or W. T. Atkins as Cashier did—and think it was given to L. S. Schluter, attorney for Mr. Robinson and representing him in seeing that the releases were signed and conditions complied with, and were surrendered in August after the organization of the Company.

3. The claims of the National Bank of Commerce against the Jefferson Lumber Company and J. H. Bemis & Company were to be surrendered to J. H. Bemis. I know this fact because it was thoroughly understood and agreed upon between Robinson, Bemis and myself.

4. The agreement was made, finally discussed and fnlly agreed upon in the office of the old Jefferson Lummer Company, the day that Mr. Robinson left for Kansas City just prior to the final organization of said Company, and left L. S. Schluter to represent his interest, and carry out the agreement. This conversation took place between Elijah Robinson, J. H. Bemis and myself, Mr. Byrnes the book-keeper was present all the while, I think.

It was to the effect and fully agreed upon with Robinson, that Robinson was to deliver all of the claims against the Jefferson Lumber Company and J. H. Bemis & Company to J. H. Bemis and also to dismiss or transfer the judgments in the United States Court at Jefferson and raise an attachment against J. H. Bemis in Louisiana. Don't know why it was not embraced in the written agreement.

5. As I have stated before, I transferred and released all claims against the Jefferson Lumber Company at the time of the organization of the Kildare Lumber Company, which was prior to the bringing of suit referred to by the National Bank of Commerce. I did intervene on claim in the matter of the receivership of the Bowie Lumber Company which claim Mr. Bemis gave me as collateral to secure an indebtedness held against him individually; he did not give me this as collateral until a day or two prior to the receivership of the Bowie Lumber Company, and I understood that it was his own property.

W. B. WARD,

Sworn to and subscribed before me this September 8th, 1894.

E. GRAENICHER,
Notary Public.

Endorsed: U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et al.

Interrogatories and Cross Interrogatories to the witness, W. B. Ward. Filed September 10th, A. D., 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Co., et. al. } Chancery No. 38.

In the Circuit Court of the United States for the Eastern District of Texas at Jefferson, Texas.

Testimony taken for and in behalf of the defendants in the above styled cause, before Lewis S. Schluter, commissioner appointed by the Court, to take the evidence and testimony in said cause, at his office in the city of Jefferson, Texas, on the 3rd and 4th days of September, 1894, after due notice to all persons interested.

Said testimony being taken for and in behalf of the defendants in the aboved styled cause as follows, to-wit:

THOMAS BYRNE, witness for the defendant, the Kildare Lumber Company, being duly sworn, testifies as follows:

Question by Mr. Todd. Where do you reside Mr. Byrne?

A. Texarkana, Texas.

Q. How long have you resided there?

A. Since July, 1892.

Q. Where did you reside before that time, and how long?

A. At Jefferson, Texas, since July, 1888.

Q. With what business have you been connected since that time?

A. Book-keeping.

Q. By whom employed?

A. I was employed, when I first came to Jefferson, by Ragley & Co., and a few days after was connected with the Jefferson Lumber Company.

Q. How long were you employed by the Jefferson Lumber Company?

A. Up to the time the Company was placed in the hands of the receiver, and was then book-keeper for the receiver until the property was sold.

Q. In whose employment are you now?

A. I am treasurer of the Bemis Lumber Company

and also book-keeper.

Q. Were you ever in the employment of the Kildare Lumber Company at any time?

A. I have been, and am now, general book-keeper for the Kildare Lumber Company.

Q. Were you in Jefferson about May 3rd, 1892, and from about the 7th to the 13th of July, 1892?

A. Yes sir.

Q. Were you present, at any time, during the negotiations in regard to the sale and purchase of the property of the Jefferson Lumber Company, and in regard to the organization of the Kildare Lumber Company, between Mr. Elijah Robinson, W. B. Ward, W. B. Chew and J. H. Bemis?

A. I was present, but I took no part in it, except I did some of the clerical work.

Q. Did you hear all, or any of the gentlemen, when Mr. Robinson was present, state among themselves the terms and understanding upon which that property was to be bought, and the Kildare Lumber Company organized?

(J. H. Culberson, attorney for plaintiff, objects to this question, on the ground that the agreement was reduced to writing.)

A. Yes, I did hear such negotiations.

Q. Please state what was said, and by whom, in your hearing, as near as you can remember in regard to such negotiations.

A. Mr. Robinson came into the office with the list of papers that he had received from the Bank of Commerce of Kansas City, and said that it was agreed that he, Judge Robinson and the witness should figure the interest on the paper held by the National Bank of Commerce, in order to ascertain the exact amount due the Bank. I wrote off a copy of the list of claims as Judge Robinson had it, and he kept the original, which he took up to his hotel, and I took my copy home, and we both computed the interest that night. The next day we met at the office of the Jefferson Lum-

ber Company, and compared our figuring. My computation of interest was about $20 greater than his. Mr. Robinson remarked that he was satisfied to take his own computation. During our general conversation over the matter, I asked Mr. Robinson who was to get this paper after the settlement was made, and in answer he remarked, "Mr. Bemis, I suppose." That was all the direct conversation I had with Judge Robinson in regard to the matter, but, of course, I overheard a great deal of the conversation between Mr. Bemis, Ward and other parties around the office.

Q. Where did these parties generally meet to discuss these negotiations?

A. They were frequently in the office of the Jefferson Lumber Company.

Q. What was the purpose, or object, of the computation of interest had by the witness and Mr. Robinson?

A. In order to arrive at the exact amount due.

Q. Why did he desire to ascertain the exact amount due at that time?

A. To ascertain how much he would be entitled to in the new organization.

Q. Did you understand from him whether the amount due by the Jefferson Lumber Company and other parties to the National Bank of Commerce, in any manner affected the organization of the new Company, and if so, how?

A. I have no direct knowledge. He said nothing to me about it.

Q. Did he make any statement to you as to whether or not the amount of the Bank of Commerce's interest in the new Company, would be regulated by the amount of indebtedness held against the Jefferson Lumber Company?

A. No sir.

Q. As a matter of fact, as the book-keeper of the Jefferson Lumber Company, and the Kildare Lumber

Company, do you know what relation the amount of the indebtedness of the Jefferson Lumber Company and J. H. Bemis & Company, bore to the interest afterwards acquired or claimed by the National Bank of Commerce in the Kildare Lumber Company?

A. It was about equal.

Q. If there was any difference between the total amount of indebtedness, and the total amount of the notes and stock of the Kildare Lumber Company, what was the amount of the difference, and how accounted for?

A. The difference was about $3250,00 being one fourth of the amount of the cash purchase of $13,000.00 which was paid for the properety of the Jefferson Lumber Company by W. B. Ward, Chew, Bemis and Robinson, at the sale.

Q. By whom was the stock of the Kildare Lumber Company written out when it was issued, and also the notes which were delivered to the National Bank of Commerce?

A. I wrote up the stock and wrote up the body of the papers.

Q. By whom were they signed?

A. W. B. Ward, president of the Kildare Lumber Company.

Q. What was the proportion of the amount of that total indebtedness that was made out in the notes, and what percentage made out in stock?

A. The settlement made to Judge Robinson was 40 per cent in notes, and 60 per cent in stock.

CROSS-EXAMINATION by J. H Culberson, attorney for plaintiff.

Q. Where did you say this conversation with Mr. Robinson occurred?

A. When he was here about the time of the organization of the Kildare Lumber Company.

Q. At what place?

A. In the office of the Jefferson Lumber Company.

Q. Who was present?

A. J. H. Bemis, W. B. Ward, Chas. Bemis, Elijah Robinson, myself and may be, two or three others.

Q. What was the date of the conversation refered to?

A. About 8th or 10th day of July 1892.

Q. What paper do you mean that Mr. Robinson said Mr Bemis would get?

A. The notes and acceptances which the National Bank of Commerce held against the Jefferson Lumber Company and J. H. Bemis & Co., for and upon which we were computing interest at that time.

Q. Did he say why Mr. Bemis was to get them?.

A. I don't believe he did.

Q. When you had this conversation witn Mr. Robinson when he said he supposed Mr. Bemis would get the papers, there was nobody present with you and Mr. Robinson as I understand It?

A. C. F. Bemiss and J. H. Bemis were sitting at the desk and Mr. Robinson and myself were at the book-keeper's desk.

Q. What brought up that question between you and Mr. Robinson?

A. simply a mater of curiosity on my part.

Q. The Kildare Lumber Company had organized then?

A. I think not, because it was necessary to know the amount of the different claims before it was finally consummated.

Q. Was it not a fact that long before that, in May, the stipulations and agreement to buy the property and organize a new Company had been entered into?

A. I don't know.

THOMAS BYRNE.

Sworn to and subscribed before me this September 4th. 1894.

L. S. SCHLUTER,
Commissioner.

C. F. Bemis, being sworn, swears as follows:

Q. What relation do you bear to Mr. J. H. Bemis?

A. His son.

Q. Where did you reside about July, 1892?

A. In Jefferson, Texas.

Q. In what business were you connected at that time?

A. I was in the lumber business in connection with the Jefferson Lumber Company and J. H. Bemis & Company.

Q. Were you present at the office of the Jefferson Lumber Company in Jefferson, Texas, July 1892, during any time when the terms of the organization of the Kildare Lumber Company was discussed, or agreed upon, between Mr. Elijah Robinson, J. H. Bemis, W. B. Ward and W. B. Chew?

A. I was.

Q. Please state as briefly and clearly as you can what was said and agreed upon by these parties at any time in your presence, as you recollect it.

A. The matter was discussed several times while I was present and the substance of the agreement, as I gathered it, was, that in the formation of the new Company, i. e., The Kildare Lumber Company, that Mr. W. B. Ward, representing the National Bank of Jefferson, and myself, and I believe Mr. Erastus Jones and Mr. J. M. Bemis, in consideration of the claims that he represented as president of the National Bank of Jefferson being given 40 per cent. of the notes in the new company, and 60 per cent. in stock of the new Company for the total amount of said claim, and Mr. Robinson, representing the National Bank of Commerce was to receive the same consideration, i. e., 40 per cent. of the notes and 60 per cent. of the stock in the new company for the total amount of the claims of the National Bank of Commerce against the Jefferson Lumber Company and J. H. Bemis & Company which were to be cancelled. There was also an agreement to the effect that the preferred creditors of the

Jefferson Lumber Company under the deed of trust made to Camp should be offered stock in the new Company to the amount of their respective claims in settlement thereof.

Q. Was such offer of stock to be made to the amount of the capital stock of the Kildare Lumber Company?

A. I understand they were to be made to the amount of their claims mentioned in the first deed to Camp.

Q. Did you present to Mr. Schluter the list of claims held by the National Bank of Commerce against the Jefferson Lumber Company and J. H. Bemis & Company which is already in evidence, and if so state when, if you remember and for what purpose you presented it to him?

A. I did present to Mr. Schluter the list referred to in his office about the 12th of July 1892.

Q. What is your recollection as to the dates of your presentation, and what means have you of remembering the date?

A. I have two means of remembering why it was on the 13th day of July, 1892. One is that the notes which were issued to Elijah Robinson bear that date. These notes I think were given in the morning. Mr. Ward who signed the notes came into the office and made some remark about his having done all he agreed to, and asked if the paper had been gotten under the agreement from the National Bank of Commerce and was told no, and he insisted that it ought to be done, and my father who was going away on the train that day told me to make a copy of the list of claims held by the National Bank of Commerce and take it to Mr. Schluter right away and have him put his name to the agreement as understood by them. Another reason is, that the statement from which I copied the list of claims is dated July 8th, while the one I took to him was dated July the 13th and I can recall no reason for making the change except to have

it bear even date with the date of the signature.

Q. Did you write any of this paper in Exhibit "A" attached to Mr. Schluter's testimony?

A. The statement proper is in my handwriting and the agreement was written by Mr. Schluter.

Q. State briefly what occurred between you and Mr. Schluter when you handed him the list?

A. When I handed Mr. Schluter the list and told him that my father wished him to sign the agreement to turn over the claims represented in the list, in accordance with the agreement, he wrote out the agreement as it shows at present on the list, and asked me if I thought that covered it, and I said it did.

Q. Was there any conversation then between you and Mr. Schluter with reference to any distinction between the claims or anything about the claims which he had sued on the Court, if so, what did he say about it?

A. The conversation as I remember it, was simply a question on his part as to whether the statement which I presented was a correct statement of the claims of the National Bank of Commerce of Kansas, City, and I told him it was.

Q. Prior to that time, do you know anything about Mr. Schluter having been sent for, or called to the office of the Jefferson Lumber Company by Mr. Robinson, or any of the parties to confer with him in reference to these negotiations? If so, state what you know about it?

A. It was about the 7th or 8th of July. There were present in the office of the Jefferson Lumber Company, Mr. Ward, my father (J. H. Bemis), Mr. Robinson, Mr. Byrne, and perhaps one or two others. They were discussing matters connected with the organization of the Kildare Lumber Company, and I don't remember whether the suggestion came from Mr. Robinson or not but I believe it did, that he wanted to get away on the train that afternoon, and it would be impossible for him to close this matter up.

Mr. Ward insisted on his remaining as he too, wanted to get away, and he insisted that he wanted to make a trip but had deferred it with considerable inconvenience to himself simply that the matter in hand might be fully completed, and that he didn't think it was good faith or good treatment on Mr. Robinson's part under the conditions to run away and leave the matter incompleted. Mr. Robinson stated that his going was imperative, but he would leave Mr. Schluter here to represent him, and upon his suggestion I went out and found Mr. Schluter, I believe in his office, and told him to go to the office of the Jefferson Lumber Company, that we wanted to see him, and he did.

Q. Did you go back with Mr. Schluter, and remain there while he was there?

A. I didn't go back with Mr. Schluter. I think I went back before he did, but was there when he came.

Q. Were you there during the time Mr. Schluter was, and this matter was discussed in his presence?

A. Am not positive as to whether I was there all the time, but was there during the time that he was there.

Q. After Mr. Schluter came over there, what were the matters that were discussed, and what was said substantially while Mr. Schluter was present by those parties?

A. The matters in hand were gone over and their positions explained with the view, as I understood the conversation, of putting Mr. Schluter in possession of the facts so that he could, in Mr. Robinson's absence, complete the transaction for him.

Q. State, if you remember, what was said, if anything, then and there with reference to the cancellation extinguishment or surrender of the claims held by the Jefferson National Bank and the Bank of Commerce against the Jefferson Lumber Company and J. H. Bemis & Company?

A. The agreement was talked over as to the cancellation by Mr. Ward, representing the National Bank

of Jefferson, and Mr. Robinson, representing the National Bank of Commerce, of Kansas City, of their respective claims upon the conditions entering into the organization of the Kildare Lumber Company being complied with, and the notes and stock issued, and as I understand it, it was understood by both parties that upon the completion of the organization, all the claims they represented were to be cancelled or surrendered. I remember, particularly, of Mr. Robinson's insisting that Mr. Schluter be the last man to act, insisting that all the other parties to the agreement carry out their part before Mr. Schluter should do anything.

Q Did Mr. Robinson leave here that day?

A. I suppose he did.

Q. Did he return at any time shortly after that?

A. Not that I know of.

Q. Who represented him after that in closing up these matters, securing the releases that were required and seeing the matter perfected?

A. I understand that it was Mr. Schluter.

Q. Did you know to whom the notes and stock issued for Mr. Robinson, from the National Bank of Commerce were delivered, and by whom and when were they delivered?

A. I do not know of my own knowledge.

CROSS EXAMINATION, By F. H. Prendergast, Attorney for defendant, T. J. Rogers.

Q. Were you one of the Directors of the Jefferson Lumber Company in July, 1891.

A. Yes sir.

Q. Did you know of the trust deed made by J. H. Bemis to W. R. Camp?

A. Yes.

Q. When did you first learn of the execution of the trust deed?

A. I knew of the execution of the trust deed at the time that it was executed.

Q. Did you acquiesce in its execution as Director?

A. I knew of its execution, and made no objection,

and I presume that silence gives consent.

Q. Had there been any complaint made by any of the directors and stock-holders that the execution of that trust deed was without authority?

A. None that I have heard of,

Q. Was W. N. Bemis a Director at that time?

A. Am not sure, but think not.

Q. Do you know whether the other Directors knew of the trust deed having been made?

A. I do not know.

Q. When did these other Directors learn that the trust deed had been executed?

A. Suppose when it became a matter of record. It was in a few days after its execution.

Q. Where did all the Directors live at that time?

A. J. H. Bemis, Byrne, Ragley and myself, lived in Jefferson, C. C. Galloway, Jr., lived in Cass County, fourteen miles from Jefferson.

The Atlanta Bank adopts the same questions and answers propounded by Mr. Prendergast, for T. J. Rogers.

Re-direct by Mr. Todd for defendant, Kildare Lumber Company.

Q. Was there ever any meeting of the Board of Directors of the Jefferson Lumber Company as a board, at which the deed of trust to Camp was ever authorized or ratified?

A. I don't think there was.

Q. You have stated that Mrs. Galloway was a stockholder, and was represented at the Board of Directors by Mr. McGarity. Is it not a fact that Mrs. Galloway expressly refused her assent to the deed of trust and took legal proceedings to have her interest protected, and was she not bought out or paid for her interest?

A. I know there was something done by Mrs. Galloway, and that her stock was afterwards bought by my father, but as to the nature of her protest, I do not know of my own knowledge.

Re-crosssed by F. H. Prendergast, attorney for defendant, T. J. Rogers.

Q. Is it not a fact that Mrs. Galloway made no objection except to the confirmation of the sale of the property made by O'Neal and Allday as Commissioners?

A. As to that, will say, that I had not spoken to Mrs, Galloway for some time before this deed of trust was given or since till this time, and except from hearsay know nothing about what she said about it.

Q. Do you know that Mrs. Galloway's interest was purchashed by your father?

A. I do not know except that it was bought after the deed of trust was executed.

Q. Is it not a fact that J. H. Bemis president of the Jefferson Lumber Company had full authority to control the affairs of the Jefferson Lumber Company? (Mr. Todd for defendant, the Kildare Lumber Company objects to this question of the extent of authority of Mr Bemis as president of the Jefferson Lumber Company because it is a question of law, and the witness is not competent to answer. Mr. Culberson for the plaintiff makes the same objection.)

A. Mr. Bemis was president of the Jefferson Lumber Company, and within the limitations of its by-laws and charter of the company had authority as president, but what that was, I cannot say.

Q. Where can the by-laws be obtained?

A. I do not know.

Q. Where did you last see them?

A. In the office of the Jefferson Lumber Company, probably 1890 or 1891.

Q. Who was the last custodian of the by-laws?

A. I think Thos. Byrne, who was secretary at the time of its failure.

Q. How long were you a director of the Jefferson Lumber Company prior to July 7th, 1891?

A. From the organization of the Company about May, 1886.

Q. Were there any by-laws regulating the power of the President and his control of the Company.

A. I think there was.

Q. Are you able to state what the regulations were?

A. No sir.

Q. Did the President in fact control the affairs of the Jefferson Lumber Company without the aid of the directors?

A. In the active management of the business, and to that extent he controlled the affairs of the Jefferson Lumber Company.

Q. Did he buy and sell property without the direction of the directors of the Jefferson Lumber Company?

A. He bought lands, and anything else necessary to conduct the business for manufacturing lumber, and had the complete control of the sale of lumber.

Q. Did he do this under general instructions from the Board of Directors, or was he instructed by the board of directors in each case what to buy and what to sell?

A. This was done under his general authority.

Q. How were these instructions given, by the by-laws or verbal direction?

A. The instructions were given in the by-laws of the Company and ratified from time to time by the directors.

Q. Has the Jefferson Lumber Company ever made any claim to the property transferred by W. R. Camp since it was transferred?

A. None that I know of.

CROSS EXAMINED by J. H. Culberson, atty for plaintiff.

Q. You state in your direct examination that you was presnt in a conference between Messrs. Schluter, Robinson and Ward and your father in the office of the Jefferson Lumber Company, did you not?

A. Yes

Q. About what time?

A. About the 7th or 8th of July.

Q. Who took part in that conversation there?

A. It was generally between the parties named.

Q. What were they talking about?

A. They were discussing the clearing up of the organization of the Kildare Lumber Company and the substitution of Mr. Schluter for Mr. Robinson to represent the National Bank of Commerce in closing up the matter, as Mr. Robinson had to go away.

Q. Was there any agreement made there, or were they speaking of an agreement that had already been made?

A. As I before stated, as I understood the conversation, it was simply to delegate to Mr. Schluter the authority to represent Mr. Robinson in an agreement already made between the parties.

Q. Was there anything said by those gentlemen there about a written contract, and agreement?

A. I heard nothing mentioned of it.

Q. Who brought up the question of what should be done with the paper held against the Jefferson Lumber Company?

A. The question was brought up by J. H. Bemis.

Q. What did he say in that conversation in reference to that matter?

A. It was a request for the paper covering the claims of the National Bank of Commerce. Mr. Robinson stated that he did not have the paper with him, but would get it in Kansas City.

Q. What was to be done with that paper?

A. It was to be surrendered to J. H. Bemis.

Q. You stated yesterday in your direct examination that it was to be cancelled.

A. Cancelled or surrendered.

Q. Did they use the word cancel or the word surrender?

A. I am not positive as to which of the words were used, the idea conveyed, however, was that this paper was the consideration for which the notes and stock were given, and was to be turned over when that was

done.

Q. Was that all that was said in reference to the paper in that conversation?

A. It was.

Q. Was Mr. Schluter present and heard that conversation?

A. I am not positive whether he was present at that time, but believe the conversation referred to, was between Mr. Ward, Robinson and J. H. Bemis; however, at the time Mr. Schluter came in there the same matter was talked over although the demand did not come from Mr. J. H. Bemis at that time.

Q. At that conversation at the time the demand was made by your father, was the agreement made at that time or before that?

A. I could not say whether there was an agreement made at that time or not. It was just about the conclusion of a conversation they were holding.

Q. What were you doing at that time?

A. Listening.

Q. Do you say that Mr. Schluter was present in any conversation in which it was agreed that this paper should be turned over and cancelled?

A. I was present at the time referred to in my direct examination and was sent for Mr. Schluter. My recollection of the conversation at that time is, that the matter was thoroughly gone over in all its bearings as to what Mr. Schluter would have to do as representative of Mr. Robinson and the National Bank of Commerce. The matter of returning the paper and cancellation of same was discussed in the presence of Mr. Schluter.

Q. You carried a list of the paper to Mr. Schluter?

A. Yes sir.

Q. When was that with reference to the conversation of which you speak?

A. The conference at the office of the Jefferson Lumber Company between Mr. Schluter and others was about the 8th of July, 1892, and my recollection is that I

carried the paper to him about the 13th of July, 1892.

Q. When you carried him the list of the paper and showed it to him, did he write the agreement on the bottom of the paper without any suggestion from you?

A. I made no suggestion whatever. The only comment made upon the agreement by either party, was a question from Mr. Schluter to me, as to whether I thought it covered the agreement.

Q. Did not Mr. Schluter tell you at the time you presented him the paper, that he knew of no such agreement?

A. He did not.

Q. Was there anything said when you presented the paper to Schluter about it being the paper that was involved in the law suit in the Federal Court?

A. No.

C. F. BEMIS.

Sworn to and subscribed before me this, 4th day of September, 1894.

L. S. SCHLUTER,
Commissioner.

Mr. J. H. Bemis, being sworn as witness for the defendant, testifies as follows:

Q. Are you J. H. Bemis mentioned in this suit?

A. I am.

Q. What relation did you occupy to the Jefferson Lumber Company before and up to the time of its failure?

A. I was President of the Jefferson Lumber Company.

Q. Were you a member of the former firm of J. H. Bemis & Co?

A. I was.

Q. Please state in your own language, as clearly and succinctly as practicable, all the matters within your knowledge relating to the sale and purchase of the property of the Jefferson Lumber Company, and in the organization of the Kildare Lumber Company, and

the negotiations, terms and conditions relating to said transactions?

A. I am familiar with the facts relating to the organization of the Kildare Lumber Company, which are substantially as follows: On May 2nd, 1892, Elijah Robinson, an attorney of Kansas City, Mo., and who was the attorney for the National Bank of Commerce of said city, and who represented the said Bank in claims against the Jefferson Lumber Company and J. H. Bemis & Company, sent for me to come to the Excelsior hotel, in the city of Jefferson, and asked me if some arrangements could not be reached whereby the claims of the National Bank of Commerce referred to could be settled in connection with the sale of the property of the Jefferson Lumber Company, which was to be made the day following, (May 3rd, 1892) under an order of the District Court of Marion County, Texas, by the commissioners duly appointed by said Court. I replied perhaps there could be a satisfactory arrangement reached, that I was anxious for the National Bank of Commerce to have their claims paid, or settled satisfactorily, and that I would do everything in my power to effect this, and would refer him to W. B. Ward, President of the National Bank of Jefferson, both the said Bank and himself being large creditors, and that whatever arrangement could be reached between them looking to the settlement and payment of their respective claims, that I would agree to, and act with them in having the same carried out. Under this talk, I sent Mr. Ward to meet Mr. Robinson, and the result of their talk was that they were to bid in the property at the sale on the 3rd day of May, and that a new company should be formed upon the following basis: That the said Ward, for himself and the National Bank of Jefferson, should relinquish all claims in and to any lumber, merchandise or lands formerly the property of the Jefferson Lumber Company. and the said National Bank of Jefferson, all

the right acquired by it as a perferred creditor under certain deed of trust made by the Jefferson Lumber Company to W. R. Camp, trustee, about July 7th, 1891. All the rights above referred to, to be conveyed or relinquished to the said or proposed new organization. That Erastus Jones should relinquish or convey to the said proposed new Company the lands conveyed to him by the said Jefferson Lumber Company in July, 1891, and whereas, the said Jefferson Lumber Company, having on the 7th day of July, 1891 by its deeds of trust conveyed to W. R. Camp, trustee, certain property to secure certain creditors therein specified, that certain of such creditors to be named by myself (exclusive of the preference to the National Bank of Jefferson) to the extent of $185,000 were to be allowed to participate in the said proposed new company, and to receive the stock of the said new company at par in settlement of their debts, and upon their relinquishment to the said proposed new company of all of their rights under said deeds of trust so far as the issue of stock to each individual should equal the amount of their respective claims. That the claims of W. B. Ward, and the National Bank of Jefferson, and the National Bank of Commerce, should be settled and paid as follows: 40 per cent. of their respective claims in the note or notes of the said proposed organization to be secured by a deed of trust on its property exclusive of the lumber and merchandise; 60 per cent. in the stock of the new company at par, in full settlement and payment of their respective claims, principal and interest. The stock issued to said Bank to be in addition to the $185,000 previously matured. Upon consultation with certain large creditors who were not to participate or receive any benefit in the proposed new company, but who were willing to consent to the above mentioned arrangement in consideration of the settlement of such a large amount of indebtedness of the Jefferson Lumber Company, but they were not willing to have the said

Elijah Robinson become the purchaser at the sale which was to take place on May 3rd, 1892. It was agreed however, that W. B. Ward, J. M. Bemis, Elijah Robinson and others should become the purchasers at such sale in pursuance of the understanding heretofore referred to between W. B. Ward, Elijah Robinson and myself. On May 3rd. 1892, while the said Robinson and the said Ward were engaged in drawing up the proposed agreement, and I was engaged with Howard O'Neal, an attorney representing the Linden Bank, the sale was made, and the property was purchased by W. B. Chew, but thereafter the same agreement heretofore referred to was reached, and Mr. Chew, the purchaser consented that W. B. Ward and Elijah Robinson were to become joint purchasers with him for the purpose of carrying out the above mentioned agreement which was reduced to writing, and a copy of the same being hereto attached marked "C" (See *Ante*. pp. 128–131.)

That on July 8th and 9th, 1892 after the sale of the Jefferson Lumber Company property had been confirmed by the District Court of Marion County, Texas, the said new Company under the name of Kildare Lumber Company was duly organized and thereafter the said property acquired by Ward, Bemis, Chew and Robinson was by them duly conveyed to the said Kildare Lumber Company about July 12th, 1892, and the said Ward, the National Bank of Jefferson and Erastus Jones, and certain preferred creditors under the said deed of trust made by the Jefferson Lumber Company, did convey and relinquish to the said Kildare Lumber Company in compliance with the agreement heretofore mentioned. And the notes and stock of the said Kildare Lumber Company, were Issued to the said National Bank of Jefferson and the said National Bank of Commerce in accordance with the agreement hereinbefore mentioned, and the stock of the said Kildare Lumber Company to such of the preferred creditors of the Jefferson Lumber Company

under the deed of trust heretofore referred to, who relinquished their rights under the said deed of trust in accordance with the agreement heretofore mentioned. This was done about July 13th, 1892. That the notes of the said Kildare Lumber Company, were issued to W. B. Chew and John M. Bemis for the sum of $3250.00 to each, the same being the amount contributed by them toward the purchase money of the Jefferson Lumber Company as shown by the agreement heretofore referred to, and copy of which is attached hereto. That the agreement and understanding made with Elijah Robinson as attorney for the National Bank of Commerce, and upon which the written agreement (copy of which has been hereto attached) between Ward, Bemis, Chew and Robinson was to be based, it was expressly agreed that certain judgments in the U. S. District Court at Jefferson, and the raising of certain attachments against my property in Louisiana were to be fully satisfied and removed, and that the settlement of the claims held by the National Bank of Commerce against the Jefferson Lumber Company and myself hereinbefore referred to, that the same were to be duly delivered to me upon the delivery of the notes and stock and that the interest of the said National Bank of Commerce was then and there to be fully satisfied. That Elijah Robinson, as attorney for the said National Bank of Commerce, did on the 8th day of July, 1892, present a written statement or memorandum of all the evidences of indebtedness claimed by the National Bank of Commerce against the Jefferson Lumber Company and J. H. Bemis & Company for settlement as provided for under the terms of the agreement made in the contract heretofore referred to between Ward, Bemis, Chew and Robinson. This was done at the office of the Jefferson Lumber Company, and the said Robinson and Thos. Byrne, book-keeper for the Jefferson Lumber Company, figured the amount of interest due upon the said claims at that date. That said

Robinson, not having the paper nor said evidences of the indebtedness with him, the same having been used in Court as the basis of suits, and not having the time to await the receipt of the papers, at his suggestion, Lewis S. Schluter was called in, and in the presence of W. B. Ward, Elijah Robinson and myself, the understanding and agreement above referred to was fully stated. The said Robinson was to ascertain, upon his return to Kansas City, whether the statement of the indebtedness which he had presented for settlement was correct; if not, he was to advise the said Schluter and he was, in addition, to send to Schluter his power of attorney, and certain other memoranda in regard to the by-laws, which were to be used by the said Kildare Lumber Company. After the said power of attorney was received and the conveyances and releases duly executed and delivered, notes and stock covering the claims presented by the National Bank of Commerce for settlement, less the acceptance of the Southern Pine Lumber Company for the sum of $1834.84, were duly delivered to the said L. S. Schluter; the $1834.84 was, by instructions of the said Robinson, deducted from the amount of the claims which had been presented as hereinbefore stated, and the notes and stock were duly delivered to the National Bank of Jefferson and to other parties as heretofore mentioned. At the time the said Robinson was in the office of the Jefferson Lumber Company, ascertaining the amount of the claim of the National Bank of Commerce, and in order that there should be no misapprehension on the part of either Mr. W. B. Ward or Mr. Robinson as to whom the indebtedness held by the National Bank of Commerce were to be surrendered, and upon which the agreed settlement was to be based, I asked Mr. Robinson his understanding of this. Robinson referred the question to Mr. Ward who answered that they were to be returned to myself. Mr. Robinson made no objection to this except that he thought that I should not ask the Bank to surrender the acceptance

of the South Western Lumber Company for about $1.500 for the reason that the Bank of Commerce had been to a great expense, that there was a large damage suit hanging over that Bank as a result of the attachment suit brought by the said Bank to recover the amount due upon the said Southwestern Lumber Company's acceptance which was still undermined. I merely replied to this that I thought it probable that I might have the damage suit dismissed, but I did not agree to do so, nor did I agree in any way to release the Bank for the return of the said paper, but did then and always have demanded and insisted upon its return together with all of the other evidences of indebtedness settled by the Kildare Lumber Company as hereinbefore set forth and the satisfying the judge. ments obtained in the U. S. District Court and raising of attachments in Louisana. At the time of the talk between Mr. Robinson, Ward and myself, when we were figuring to ascertain the amount due the National Bank of Commerce, it was distinctly and positively understood and agreed npon the part of Mr. Robinson as attorney for the National Bank of Commerce that to the extent that the said Bank failed to return and deliver any or all of the said evidences of indebtedness to be embraced in the said settlement, that to such an extent the notes and stock to be delivered to them by the Kildare Lumber Company was to be reduced and cancelled proportionately, i, e, 40 per cent of such amount as they failed to surrender and return to me was to be endorsed upon the notes given them in settlement, and the stock held by them was to be reduced 60 per cent. None of these conditions have been complied with by plaintiff excepting the raising of the attachment suit in Louisiana.

Q. In pursuance of the agreement as stated by you did the other parties to this organization viz; Mr. Ward and J. M. Bemis, surrender and deliver to you the evidences of the indebtedness which they held against the Jefferson Lumber Company and J. H. Be-

mis & Co.

A. The National Bank of Jefferson a long time before surrendered all the evidence of the indebtedness it held against the Jefferson Lumber Company in consideration of the stock of lumber and the stock of merchandise sold to them excepting such indebtedness as was covered by their preference under the Camp deed of trust.

Q. At the time of the organization of the Kildare Lumber Company who claimed the stock of lumber and merchandise referred to by you and what was the nature of the claim and the value of the lumber and merchandise?

A. The National Bank of Jefferson was claiming the stock of lumber and merchandise to the extent and in consideration of the paper which had been surrendered.

Q. What was done by the National Bank with this claim to the lumber and merchandise when the organization of the Kildare Lumber Company was perfected, and the notes and stock delivered to the National Bank?

A. After the organization of the Kildare Lumber Company, the National Bank of Jefferson executed a Release to the Kildare Lumber Company of all their interest in the said stock of lumber and merchandise in consideration of the notes issued by the Kildare Lumber Company to them.

Q. Was such release or releases in writing?

A. It was.

Q. Please produce the writing. (The release in writing is here produced and attached hereto marked Exhibit "E".

CROSS-EXAMINED by R. R. Taylor, Attorney for T. J. Rogers.

Q. You were the president of the Jefferson Lumber Company?

A. I was.

Q. Has the Jefferson Lumber Company been made

a party to this suit?

A. I think it has.

Q. Have you been served with a process for the Jefferson Lumber Company?

A. Yes.

Q. Have you filed an answer for the said Jefferson Lumber Company in this case?

A. I instructed an answer to be filed.

Q. Was there any meeting of the Board of Directors authorizing you to make this answer?

A. There was not.

Q. By what authority did you file an answer for the Jefferson Lumber Company?

A. I acted under no authority.

Q. What conveyances were made by the Jefferson Lumber Company, about July 7th, 1891, other than the conveyances to Mr. W. R. Camp?

A. The deeds to W. B. Ward and Erastus Jones.

Q. Approximate the value of the property covered by the conveyances to Ward and Erastus Jones?

A. Consideration for the conveyance to W. B. Ward, was $10,000 and the consideration for the conveyance to Erastus Jones was $21,000. The value as expressed in those deeds, is what I considered a fair price or security.

Q. Were they transferred in security or in payment?

A. In payment.

Q. Was $31,000 the valuation of that property at that time?

A. I so considered it. In addition to the above conveyance, there was sold to the National Bank of Jefferson the stock of lumber and the stock of merchandise that was owned by the Jefferson Lumber Company, about July 7th, 1891, for the aggregate value of $62,000, being the same claim of the Bank on the lumber and merchandise heretofore referred to.

Re-direct by Mr. Tood.

Q. In instructing an answer to be filed for the Jefferson Lumber Company, in this case, in what capacity

did you act?

A. At the last President of the Jefferson Lumber Company. The process was served on me as President of the Jefferson Lumber Company. Said Jefferson Lumber Company has not been doing business since July, 1892.

The Atlanta Bank adobts the questions and answers of Rogers, Trustee.

CROSS-EXAMINED by J. H. Culberson, attorney for plaintiff.

Q. Was not all the agreements and stipulations in reference to the purchase of the Jefferson Lumber Company's property, and the organization of the new Company in writing, and signed by the parties?

A. Everything, excepting the agreements that were referred to after the organization of the Kildare Lumber Company.

Q. Was there any agreement between the parties with reference to the surrender of the claims held against the Jefferson Lumber Company by them?

A. It was always understood and agreed that all the evidences of the indebtedness held by the National Bank of Commerce, and all others, was to be returned when the agreed settlements were made.

Q. Did that agreement and understanding reach back behind the written agreement which the parties signed?

A. That was the basis upon which the written agreement was made.

Q. Did that agreement to surrender the paper antedate the written agreement signed by the parties?

A. The written agreement was based upon the surrender and delivery of the indebtedness mentioned.

Q. Did you ever read that written agreement before it was signed?

A. I cannot say I was not a direct party to the agreement, but indirectly; Messrs. Ward and Robinson were the active parties to that agreement.

Q. Did you know that written agreement did not

stipulate that this paper was to be returned?

(Mr. Todd for the defendant objects to this question because the construction of the written agreement is a question of law.)

A. I always supposed that the written agreement showed that distinctly.

Q. Were you present at a conversation had between Mr. Ward, C. F. Bemis, Robinson and Schluter at the office of the Jefferson Lumber Company about July 8th, 1892?

A. I was present at the conversation when Mr. Robinson, Ward, Schluter and myself were present, either the 8th or 9th of July.

Q. Were Mr. Byrne and C. F. Bemis present?

A. Think Mr. Byrne was present at the time, and think very likely C. F. Bemis was present.

Q. Was it not understood and agreed in that conversation that this paper was to be cancelled?

A. There was never any talk about cancelling the paper whatever unless cancelling meant to surrender.

Q. At the time that you executed this deed of trust to Camp, had you previous to that time made any transfer of property to the National Bank of Commerce and to W. B. Ward?

A. I think about the same date as the deed of trust I made the couveyance heretofore referred to.

Q. Was not the property that you sold to the National Bank sold by the receiver at the sale?

A. I have stated that all the property that had belonged to the Jefferson Lumber Company and including this property conveyed to the National Bank was sold at the said sale but subject to the claim of the National Bank of Jefferson.

Q. How much indebtedness did that leave in the hands of Ward and the National Bank against the Jefferson Lumber Company?

A. About $20,000.00 which was included in the Camp deed of trust.

Q. How was the debt extinguished?

A. The debt of the National Bank of Jefferson what was covered by the sale of lumber and merchandise, and the preference of the deed of trust was settled by the notes of the Kildare Lumber Company, and stock of the Kildare Lumber Company for the aggregate amount of the same.

Q. How much was the aggregate amount?

A. About $91,000 or $92,000.

Q. Was this paper held by the National Bank and Ward ever returned?

A. The paper held by the National Bank which was covered by the sale of lumber and merchandise amounting to $62,000.00 was turned over to me at the time of the said sale about July 7th or 8th, 1891.

Q. What became of the paper held by Mr. Ward?

A. All the indebtedness held by Mr. Ward was turned over at the time of the conveyance of the land covered by the deed of trust heretofore referred to.

Q. Is it not a fact to-day that Mr. Ward holds some of that paper?

A. It is not a fact.

Q. Is it not a fact that a year after the transfer of the land to the Kildare Lumber Company. Mr. Ward did not intervene in the receivership of the Bowie Lumber Company in Bowie County Texas, upon this paper that you claimed was transferred to you?

A. It is probable that Mr. Ward made an intervention in the matter referred to upon one or two pieces of paper which was delivered to me in the settlement which I have heretofore referred to; he did so for me. Mr. Ward had no interest then or now in that paper.

Q. Didn't he claim the title to it in that suit?

A. I presume he did.

RE-DIRECT by Mr. Todd.

Q. At the time the Jefferson Lumber Company, through you as president, executed the trust deed to W. R. Camp before referred to, what was the condition of the Jefferson Lumber Company as to

its solvency or insolvency?

A. Was insolvent.

Q. Did not all these several conveyances then made, cover all the property of the Jefferson Lumber Company of every character?

A. They did.

Q. A short time after the execution of the Camp deed of trust, was not the Jefferson Lumber Company placed in the hands of a Receiver?

A. On the 21st of July, at the suit of the Galveston National Bank, a Receiver was appointed for the property of the Jefferson Lumber Company, and since that time, said Company, as a private corporation, has ceased to do business. The receivership proceedings were pending in the District Court of Marion County, Texas, until the property was sold on the 3rd day of May, 1892, under order of said Court, and on the 30th day of June, 1892, said sale was confirmed by the Court. The Jefferson Lumber Company has ceased to do business, as a corporation, since the time of the appointment of the Receiver. T J. Rogers, assignee, of the Citizens Bank did not intervene in said receivership proceedings upon the claim preferred in the Camp deed of trust, and declared on in his cross bill in this suit.

CROSS EXAMINED by G. J. Armistead, attorney for W. B. Ward.

Q. Please state, if you know, whether W. B. Ward owns or holds any paper against the Kildare Lumber Company, if so, what is it?

A. The note for $2,500, set out in his petition, was a part of $3,250 contributed by Mr. Ward towards the purchase mentioned at the sale of the Jefferson Lumber Company's property, and the note for $2,000 is a part of that contributed by J. M. Bemis. Both notes are

still unpaid, and held by W. B. Ward in this case, the note favor of J. M. Bemis having been transferred to W. B. Ward.

CROSS EXAMINED by F. H. Prendergast, attorney for T. J. Rogers.

Q. Which of the preferred creditors in the trust deed to Camp, have not released their claim under that deed?

A. The release is signed by all excepting A. Weinstein, The Citizens Bank of Jefferson, First National Bank of Milton, Penn., Marshall National Bank, The Atlanta Bank and the Southern National Bank of New York.

Q. What is the present situation of Mr. Weinstein's claim, and who owns it now?

A. I own it.

Q. Has there been any stock issued to cover his claim?

A. It might have been signed up by the Company, but never passed out of the hands of the Company, I think.

Q. Has Mr. Weinstein parted with all of his interest under the trust deed to Camp?

A. I suppose I have acquired all the interest that he had.

Q. For what purpose did you acquire his interest?

A. For the purpose of cancelling his claim or controlling it. I was endorser on the note or notes, and he brought suit upon the note, recovered judgment and collected the money from me.

Q. At what date was that collection?

A. Within the last 12 or 18 months.

Q. What is the status of the claim in the trust deed of the Southern National Bank of New York?

A. The Bank holds the claim.

Q. What is the status of the First National Bank of Milton, Penn., in the trust deed?

A. It is still owned and claimed by them, and the claim of the National Bank of Marshall is owned and

claimed by me.

Q. Who else besides the Jefferson Lumber Company was bound on the paper held by the Marshall National Bank?

A. J. H. Bemis & Company as endorser or maker.

Q. Who else was bound on the First National Bank of Milton, Penn?

A. Don't recall just who all, but I was bound personally on that claim,

Q. Who else was bound on the claim of the So. National Bank of N. Y. besidese the Jefferson Lumber Company?

A. I was indorser either personally or through J. H. Bemis & Co.

Q. How much stock has been issued by the Kildare Lumber Company?

A. Can not tell you without an examination of the records; will say about $162,000 outside of the stock to the National Bank of Commerce and the National Bank of Jefferson.

Q. Is that release that you hold in your hands, signed by a number of parties, the only releases that were given by the people secured in the Camp deed of trust?

A. I know of no others. When I signed the release for A. Weinstein I did it under the apprehension that I could control the claim, and without consulting him, but I afterwards saw him and he refused to consent to the relinquishment; then I erased his name. It was after this that Weinstein sued and collected the money.

J. H. BEMIS.

Sworn to and subscribed before me Sept. 4, 2894.

L. S. SCHLUTER.
Commissioner.

I hereby certify that the above and foregoing answers, depositions and testimony of the witnesses, Thos. Byrne, C. F. Bemis and J. H. Bemis were made by the said witnesses before me, and were sworn to and subscribed by the said witnesses respectively

before me. In witness wheof I have hereunto set my hand this, the 20th day of September, 1894.

L. S. SCHLUTER,
Commissioner.

EXHIBIT "E."

The State of Texas }
Marion County. } WHEREAS, about July 5th, 1891, the Jefferson Lumber Company, was indebted to the National Bank of of Jefferson, in the sum of about Sixty thousand dollars, and in payment of said indebtedness, the Jefferson Lumber Company, sold and delivered to said bank about eight million five hundred. thousand feet of lumber situated at the Company's mills at Atlanta and Kildare, Texas, and a stock of goods in the Galloway store house at Kildare and whereas the said lumber and stock of goods was seized by H. A. O'Neal, Receiver for the Jefferson Lumber Company, and by an order of the District Court of Marion County, Texas all of the property of said Jefferson Lumber Company, was sold by commissioners appointed to make said sale and said sale was made subject the claim of the Nationtl Bank of Jefferson to said lumber and stock of goods.

Now therefore, the National Bank of Jefferson, in consideration of the receipt of certain promissory notes and shares of the capital stock of the Kildare Lumber Company, which is hereby acknowledged, the said National Bank of Jefferson, hereby releases, relinquishes, and transfers to the said Kildare Lumber Company all of the rights, title and interest in and to the said lumber and stock of goods, conferring on said Kildare Lumber Company, all claims, title and interest that it ever had to said lumber and stock of goods.

Witness our hands this 12th day of July with the seal of the Bank impressed hereon.

The National Bank of Jefferson
(SEAL.) By W. T. Atkins, Cashier.

STIPULATION.

U. S. Courts.

National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Co., et. al. } Chancery No. 38.

We agree that either party may use any portion of the Record in the cause of Galveston National Bank, vs. Jefferson Lumber Company, in District Court of Marion County, Texas. The party agreeing to furnish statement of what he will offer before the trial begins.

F. H. PRENDERGAST,
Attorney for T. J. Rogers.
TODD & RODGRS,
Attorneys for Kildare Lumber Company.
J. H. CULBERSON,
Attorney for Plaintiff.
L. S. SCHLUTER,
Attorney for Atlanta Bank.

For Exhibit "A" See Ante, P. 153.
For Exhibit "B" See Ante. P. 154.
For Exhibit "C" See Ante, Pages 128-131; 154-155.
For Exhibit "D" See Pages 155-162.

EVIDENCE FOR T. J. ROGERS.

The defendant, T. J. Rogers, assignee, introduced the following evidence in support of his cross bill:

1. We introduce the trust deed from the Jefferson Lumber Company to W. R. Camp, trustee on lands and timber, dated July 7th, 1891, filed for record July 8th, 1891.

2. The trust deed from the Jefferson Lumber Company to W. R. Camp, trustee, dated July 7th, 1891, filed for record and registration, July 8th, 1891.

3. The trust deed from the Jefferson Lumber Company to W. R. Camp, trustee, conveying railroads,

mills, machinery, etc., dated July 8th, 1891, filed for record July 9th, 1891. This covers lots in Kildare, Cass County, Texas, copies of which are hereto attached marked Exhibit "A," "B" and "C.',

4. Certified copy of the order of the District Court of Marion County, ordering the sale of the Jefferson Lumber Company's property, dated January 21st, 1892. Copy attached, marked Exhibit "D."

5. Copy of the order of the Court, approving the sale of said property, dated June 30th, 1892. Copy attached marked Exhibit "E." Also offer copy of the deed of E. A. Allday and H. A. O'Neal, Commissioners, who sold the property, under order of the Court, to W. B. Ward, W. B. Chew, J. M. Bemis and Elijah Robinson, copy hereto attached marked Exhibit "F."

We offer the affidavit of D. D. Dodd, made in this cause, the 9th of September, 1893. Copy marked Exhibit "G" attached thereto.

We also offer the affidavit of J. K. Bivens, made in this cause September 9th, 1893, showing the value of the two railroads to be $125,000.

Also offer affidavit of J. H. Graham and E. Allday sworn to in this cause, September 9th, 1893 and Exhibit "C" attached thereto. We offer affidavit of Thos. Byrne, made in this cause on the 10th of September, 1893. The Atlanta Bank offers the same exhibits, affidavits, trust deeds and other evidence, as offered by Rogers.

The claims of the Atlanta Bank, secured by the deed of trust to Camp, are as follows:

One draft dated at Jefferson, Texas, April 6th, 1891, for the sum of $2,217.11, drawn by the Jefferson Lumber Company on Whitaker and Garrett Lumber Company at Kansas City, Mo., and payable three months after date, and accepted by the drawee, in writing across the face thereof.

One draft dated at Texarkana, Texas, April 1st,

1891, for the sum of $1257.80 drawn by the Jefferson Lumber Company on W. L. Whitaker at Texarkana, Texas, and payable ninety days after date, and accepted by the drawee in writing across the face thereof, and indorsed on the back by Jefferson Lumber Company and J. H. Bemis.

One draft, dated at Texarkana, Texas, April 1st, 1891 for the sum of $1910.00 drawn by the Jefferson Lumber Company on Whitaker and Garrett Lumber Company at Texarkana, Texas, and payable three months after date. Accepted by writing across the face thereof and indorsed by the Jefferson Lumber Company and J. H. Bemis.

One draft, dated Jefferson, Texas, April 15th, 1891 for the sum of 1963.71, drawn by the Jefferson Lumber Company on Whitaker and Garrett Lumber Company at Kansas City, Mo., payable three months after date and accepted by the said drawee in writing across the face thereof.

All of the originals of which said paper will be produced on the trial if demanded, it being agreed that it would not be attached to this record.

EXHIBIT "A." Offered by T. J. Rogers, Assignee

The State of Texas, }
County of Marion. } Know all men by these presents that we, the Jefferson Lumber Company, a corporation duly chartered under and by virtue of the laws of the State of Texas with its principal office in the city of Jefferson in the County of Marion and State of Texas, and of which said corporation J. H. Bemis is president, with full power and authority to act in the premises for and in consideration of the sum of $10.00 ten dollars to us in hand paid by W. R. Camp of Bexar County, Texas, the receipt whereof is hereby acknowledged and confessed, and of the further consideration and purpose hereinafter expressed have sold, transferred and conveyed, and by these

presents do sell, transfer and confirm, unto the said W. R. Camp, trustee and to his successors in this trust the following described property, to-wit:

Property described in Exhibit "C" attached to D. D. Dodd's affidavit.

To have and to hold the above described timber, together with all the rights, liens and privileges hereto in anywise belonging, unto the said W. R. Camp, his heirs and assigns forever and we do hereby bind ourselves and successors, and legal representatives to warrant and defend all and singular the same unto W. R. Camp, trustee or his substitute and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

This conveyance, however, is intended as a trust for the better securing of the following named debts respectively with preference and priority one over another in the order named herein. Beginning with the Mechanics, Labors, Artisans, and employes of the Jefferson Lumber Company as the first preferred creditors and ending with the Marshall National Bank in the order named herein consecutively, as follows, to-wit:

1. Amounts due divers mechanics, artisans, and employes of the Jefferson Lumber Company at its several mills, situated at Atlanta, Kildare and mill No. 1 and 2 near Kildare, all in Cass County, Texas, in various amounts aggregating the sum of ..... $ 5,367.53
2. The National Bankof Jefferson, for 20,760.53
3. Linden Bank, Linden, Texas, for 9,896.14
4. Atlanta Bank, Atlanta, Texas, for 7,348.62
5. Erastus Jones, Spencer, Mass., for 54,471.84
6. John M. Bemis, Buffalo, N. Y. for 35,738.10
7. A. Weinstein, Jefferson, Texas, for 6,169.88
8. J. B. Alexander, Staten Island, New York, for 45,000.00
9. Southern Pine Lumber Company, Texarkana, Texas 12,674.10
10. Grigsby Bros., Dallas, Texas, for 29,628.03
11. Citizens Bank, Jefferson, Texas, for 9,486.07

12. Southern National Bank, of New York for 6.000.00

13. Sulphur Lumber Company, Sulphur Texas, for 9,245.34

14. First National Bank, Milton, Pa., for 4,350.95

14. Marshall National Bank, Marshall, Texas for 3,500.00

In the payment of divers and sundry notes, drafts, acceptances, bills and claims and accounts a better description of which cannot now be given herein than embraced in the respective several schedules and bills of particulars hereto attached and marked exhibits one to fifteen inclusive and a part hereof, and each and all of the originals are herein referred to and made a part hereof, and upon each and all of which said notes, drafts. acceptances and bills. the name of the Jefferson Lumber Company was duly endorsed before the maturity of same and upon the faith and credit of which said indorsement by the said Jefferson Lumber Company the said creditors hereinbefore named discounted said notes, drafts, acceptances and bills specified in said schedule respectively at the special instance and request of the said Jefferson Lumber Company before the maturity thereof for a valuable consideration in cash paid when said notes, drafts, bills, and acceptances were discounted, and thereupon the said Jefferson Lumber Company delivered said notes, drafts, bills and acceptances to the aforesaid creditors respectively, whereby and by reason of its said respective indorsements the Jefferson Lumber Co. is and became liable and bound to pay said notes, drafts and bills according to the face tenor and effect thereof respectively, upon the payment of which said notes, drafts and bills according to the face, tenor and effect thereof being well and truly made, then and in such case this conveyance is to become null and void and shall be released at the expense of the Jefferson Lumber Company. But in case of failure or default in the payment of said notes, drafts and bills together with

the interest thereon accrued according to their terms, face, tenor and effect at the maturty of the same then the said W. R. Camp, trustee is by these presents fully authorized and empowered and it is hereby made his special duty at the request of the aforementioned creditors to sell the above described property, and premises to the highest bidder for cash paid in hand at the court house door in Linden, Cass County, State of Texas, after giving public notice of the time and place and terms of said sale by posting written notices as required in execution sales, for twenty days prior to said day of sale and after said sale to make to the purchaser or purchasers thereof a good and sufficient deed in law to the premises so sold with the usual covenants and warrants, and to receive the proceeds of said sale and the same to apply to the payment of said notes, drafts and bills in the order hereinbefore named, the interest thereon accrued and expenses of executing this trust, including five per cent. commission to said trustee, holding the remainder thereof subject to the order of said Company; and it is hereby expressly provided that should the said W. R. Camp, trustee, from any cause what ever fail or refuse to act or become disqualified from acting as such trustee, then the said National Bank of Jefferson, by its president W. B. Ward, shall have power to appoint a substitue in writing, who shall have the same power as is hereby delegated to W. R. Camp, trustee, and we by these presents fully and absolutely ratify and confirm any and all acts which the said W. C. Camp, trustee, or his substitute, as herein provided, may do in the premises, by virtue hereof. In testimony whereof, the Jefferson Lumber Company has caused its corporate name to be hereto signed by its president and its corporate seal here affixed, this the 7th day of July, A. D., 1891.

Signed. JEFFERSON LUMBER COMPANY

(Jefferson Lbr Co. seal) By J. H. Bemis, President.

EXHIBIT "B."

A trust deed from the Jefferson Lumber Company conveying to W. R. Camp, trustee, the following described property:

1. Railroad and equipment from Kildare to Linden. 12 miles.
2. Railroad from Atlanta, northwest. 12 miles.
3. Saw mill, planer and all appurtenances at Atlanta, Texas.
4. Saw mill, planer and all appurtenances at Kildare, Texas.
5. Saw mill and appurtenances, known as mill No. 2, three or four miles southwest from Kildare, Texas, in Cass county.

Conveyed upon the same trusts, and to secure the same debts as the other deed between the same parties conveying the lands, both dated July 7th, 1891.

A trust deed from the Jefferson Lumber Company, by J.H.Bemis, president, to W. R. Camp, trustee, conveying the following property: Fractional Block 35, in Kildare, Cass County, Texas, the land on which the Jefferson Lumber Company's lumber is located being a leasehold interest, dated July 8th, 1891, and conveyed to secure the same debts as the other two deeds.

State of Texas, }
County of Marion. } Personally appeared James K. Bivins before me, the undersigned authority, and on oath says that he is acquainted with the property now owned by the Kildare Lumber Company.

That it has about twenty miles of railway, 40 cars and 3 locomotives of the aggregate value of $75,000.

That it owns saw and planing mills at Atlanta and Kildare Texas and necessary tram-ways of the reasonable value of in the aggregate $50,000.00.

That it has a large quantity of lumber on hand which lumber is of the value of $8.50 per thousand feet.

That he has examined the affidavit of D. D. Dodd

herewith filed and exhibits thereto attached showing the value of the land and in the judgment of affiant the value of said land and timber as shown in Exhibits A. B. and C. attached to said affidavit is about correct. Affiant says that he is a member of the firm of Bivens, Venable & Co., of Bivens, Cass County Texas and that they were operating a saw mill at the point and having been for a number of years and they are largely interested in railroads connected with lumber mills and have extensive experience in buying pine lands and from the information thus obtained he makes this affidavit.

Sworn to and and subscribed before me this 9th day of September 1893.

J A. ARMISTEAD,
Justice of the Peace and Ex-Officio Notary Public in and for Marion County Tex.

The National Bank of Commerce, of Kansas City, Mo.,
vs.
The Kildare Lumber Co. et al-

In the Circuit Court Eastern District of Texas.

Personally appeared before me, the undersigned authority, D. D. Dodd, and on oath says that he now resides in Cass County Texas has so resided for the past thirty years; that he has held the office of county clerk in said county for the space of six years and that he has made a complete abstract of all lands in said county; that his business has called him to investigate and learn the condition and value of lands in said county, he having purchased a large number of acres of land for investors; that he is acquainted with the following described tracts of land, said to belong to the Kildare Lumber Company, as set out in Exhibit "A" "B." and "C." hereto attached, and affiant states that is the best of his judgment, the tracts of land and timber as set out in said exhibits are each

worth the amount set opposite each tract, and affiant knows of his own knowledge that the lands embraced in Exhibits "A" and "B" were not included in the deed of trust executed by the Jefferson Lumber Company to W. R. Camp, trustee, July, 1891, and that the land contained in Exhibit "D" was not included in the deed of trust given to W. R. Camp, trustee, July 1891, neither were they included in the lands deeded to W. R. Camp and Erastus Jones at the same time.

D. D. DODD,

Sworn to and subscribed before me this 9th day of September, A. D., 1893.

W. E. ESTES,
Notary Public, Bowie County, Texas.

EXHIBIT C.

The following described tracts of land situated in Cass County, Texas:

640	Acres	B. B. B. & C. R. R. Co. Survey Abstract 131,			
	"	$1.00			$1280.00
1545	"	Geo. S. Young Survey	@	$2.00	3090.00
114	"	John Hall Survey	@	2.00	228.00
320	"	Richard Barrington Survey	@	2.00	640.00
934	"	S. Deman Survey	@	2.00	1868.00
79	"	B B B & C R R Co. Survey	@	2.00	158.00
160	"	M. D. Frazier Survey	@	2.00	320.00
800	"	James Clark Survey	@	2.00	1600.00
186⅔	"	William Smith	@	4.00	746.66
320	"	B B B & C R R Co. Survey	@	4.00	1280.00
175	"	P. M. Keaton Survey	@	2.00	350.00
160	"	E. T. Jackson Survey	@	4.00	640.00
125	"	I. M. Givens Survey	@	2.00	250.00
320	"	Jessie Walling Survey	@	2.00	640.00
Block No. 34 in the town of Kildare Mill on it.			@		
640	Acres	Joseph Jones Survey	@	4.00	2560.00
1 12-100	Acres	Jane Richie Survey			
9	Acres	Jane Richie Survey			
334⅓	"	Fisher & Miller Survey	@	4.00	1137.32
Right of way purchased from M. A. Birmingham & Everett on a portion of P. M. Keaton Survey.					
208	Acres	William Donahoe Survey	@	$2.00	$ 416.00

160	"	R. Britt Survey	@ 2.00	320.00
834	"	Henry Buckler Survey		3336.00
74½	"	A. Emanuel		149.00
85	"	I. N. Watson, Kildare Mill		
283⅓	"	John McKirley		1133.00
440	"	Harrison County		880.00
10	"	Greenleaf Terry Survey		20.00
798	"	D. O. Diskill		3192.00
100	"	Greenleaf Terry Survey		200.00

Block 35 in Kildare. Mill property.

Also pine timber upon the following surveys of land in Cass County, Texas:

160	Acres	William Hutton Survey	$ 480.00
202	"	W. B. Wilson Survey	404.00
600	"	William Donahoe Survey	600.00
160	"	C. Lemon Survey	320.00
100	"	K. A. Welborn Survey	200.00
900	"	A. D. Duncan Survey	2700.00
173	"	R. C. Graham Survey	174.00
430½	"	K. A. Welborn Survey	2191.50
78½	"	A. D. Duncan Survey	235.50

$35579.31

State of Texas, }
County of Cass } Before me, J. K. Oden, Clerk County Court in and for Cass County, Texas, personally appeared John H. Graham, Ex-County Surveyor of Cass County, Texas, and now a resident citizen of Cass County, Texas and E. A. Allday, who also resides in Cass County, Texas, who after having been by me duly and legally sworn, depose and say upon their oaths that they know the land described in Exhibits A, B and C hereto attached and made a part hereof, and that the valuation set opposite each survey is reasonable and fair, and that all of said land is situated in Cass County, Texas, except the D. O. Driskell survey, which is situated in Marion County, Texas. That the total valuation of the lands described in said Exhibits, is sixty-one thousand and thirty-six dollars.

J. H. GRAHAM,
E. A. ALLDAY.

Sworn to and subscribed before me, this 9th day of September, A. D., 1893.

J. K. ODEN,
Clerk of the County Court, Cass County.

Exhibit "C" attached to D. D. Dodd's affidavit.

TRIAL BALANCE of the general books of the Kildare Lumber Company:

ASSETS.		LIABILITIES.	
Kildare Mills,	$41,266.58	Bills payable,	$79,637.89
Atlanta Mills,	14,972.94	Bemis Lbr Co	581.71
Bills receivable,	2,000.00	H. D. Bemis	68.59
Railroads,	79,000.00	J. D. Kitchen	151.69
Plants,	50,000.00	Excess of assets	
Real estate,	100,000.00	over liabilities,	207.273.17
	$287,719.05		$287,719.05

The State of Texas, }
County of Bowie, }

Before me, the undersigned authority, personally came Thos. Byrne, who being by me duly sworn, on his oath deposes and says: That he is now, and has been, since the organization of the Kildare Lumber Company, the general and chief book-keeper of the said Kildare Lumber Company, and has charge and supervision of the books of said Company, and knows thereof; and that the above and foregoing statement of the assets and indebtedness of said Kildare Lumber Company, as shown by said books, is correct and true.

THOS. BYRNE.

Sworn to, and subscribed before me, this the 10th day of September, A. D., 1891.

G. B. ELLIS,
Notary Public, Bowie County, Texas.

EXHIBIT "D."

(Decree of District Court of Marion County, Texas.)

The Galveston National Bank,
No. 5009. vs.
Jefferson Lumber Company.
January 21st, 1892.

On this day came on to be heard the motion of the plaintiff, The Galveston National Bank, asking an order of sale, of all the property of the Jefferson Lumber Company, in the hands of the receiver of said Company, and the plaintiffs and defendants, and a number of intervenors appearing by counsel, and the Court having heard full arguments for and against the motion, and having duly considered the same, granted the motion.

It is, therefore, ordered, adjudged and decreed, that H. A. O'Neal and E. A. Allday be, and are hereby appointed joint commissioners of this Court, in this cause either or both to sell all the property of the Jefferson Lumber Company, at public auction for cash to the highest bidder at the court house door in the city of Jefferson, County of Marion, on the first Tuesday in May, 1892 and that said commissioners or commissioner make due advertisement of said sale in the Jefferson Jimplecute and the Dallas News, said advertisement to be made once a week for at least eight weeks before said sale, and that when said sale is made, the same shall be reported to this Court for confirmation or rejection. And it is further ordered and decreed, that all the property and assets of the Jefferson Lumber Company, real, personal and choses in action be sold at said sale in bulk as a whole or a lot, and that the sale conveying the title and interest therein of the Jefferson Lumber Company, as it stood on July 21st, 1891, as to such as it then owned, and all the property as it now stands, and that said sale be made without prejudice to the rights of any person or persons, corporation or corporations, asserting any lien or title to said property or any of it.

And it is further decreed that on payment into this Court of the purchase money of said sale, that the same be held in the Registry of this Court, and deposited with the National Bank of Jefferson, to abide the final decree herein, as to the respective rights of the parties herein or who may hereafter intervene herein within the time that this court has or may decree for allowing interventions. For a more particular description of the property as to which the rights, title and interest of the Jefferson Lumber Company therein to be sold, reference is here made to the description of certain lands and timber and other property which were conveyed by the Jefferson Lumber Company to W. R. Camp, trustee, by the two deeds of trust, each bearing date the 7th day of July, A. D., 1891, and each filed for record in the County Clerk's office of the County of Cass on the 8th day of July, 1891, and also to a deed executed by the Jefferson Lumber Company to W. B. Ward, of record in the deed records of Marion County, State of Texas, in Vol. V., pages 574 to 576. Also a deed from Jefferson Lumber Company to W. B. Ward, of Record in deed record of Cass County, State of Texas, in Vol. 22, pages 328 and 329. Also a deed from Jefferson Lumber Company to W. R. Camp, trustee, of Record in records of said County of Cass, in Vol. D. of Mortgages, on page 230. Also a deed from the Jefferson Lumber Company to Erastus Jones, filed for record in the County Clerk's office of said County of Cass on the 8th day of July, 1891. Also as to the real and personal property and choses in action to the inventory and list of property reported by the Receivers in this cause from time to time in his reports on file in this cause, whether said property was on hand and belonged to the Jefferson Lumber Company, at the time of appointment of the Receiver or has since been acquired unders order of this Court.

It is further ordered and decreed, that the sale as ordered herein is as to the lumber that was on hand or may be hereafter cut, only to apply to such lumber as

may be unsold at date of sale now and this decree for sale is not to affect the right of the receiver to continue the business of the Jefferson Lumber Company up to the date of sale.

And whereas, at the date of the appointment of the Receiver heretofore made, the National Bank of Jefferson, was claiming the title and posession of 9,200,000, feet of lumber on the yards of said Company, which lumber was upon the order of this court heretofore made delivered to the receiver by said bank.

It was therefore ordered that the purchaser of said property at the sale here ordered, shall take the lumber on hand at the date of sale, subject to any claim the said bank may have, it being the intent and purpose of this order to put the lumber which may be on hand at the date of the sale in the place and stead of the lumber heretofore surrendered by said bank to said receiver; provided the same shall not be in excess of 9,200,000. This order shall in no manner impair the rights of the National Bank of Jefferson under the order heretofore made.

It is further decreed that the purchaser at said sale be required to pay ($5,000.00) five thousand dollars upon his bid, if accepted and balance on confirmation of sale and delivery of deed

The State of Texas }
County of Marion. }

I, C. G. Graham, Clerk ot the District Court of Marion County, Texas, do hereby certify that the foregoing is a true and correct copy of the original order of sale of the property of the Jefferson Lumber Company, and the same appears of record in my office in book M, pages 372, 373 and 374.

Given under my hand and the seal of said Court at office in Jefferson, this 1st day of September, 1894.

C. G. GRAHAM, Clerk.

ORDER OF CONFIRMATION.

Galveston National Bank
No. 5009. vs.
Jefferson Lumber Company. } June 30th, 1894.

Whereas, on January 21st, 1892, upon the application of the Galveston National Bank, plaintiff in the above entitled case, an order was made directing a sale of all the property and effects of the Jefferson Lumber Company, and upon the terms stated in said order, H. A. O'Neal, the Receiver herein, and E. A. Allday, the Master in Chancery, appointed by this Court Commissioners to make such sale, and having advertised said sale, as directed by said order, the said Commissioners did, on May 3rd, 1892, sell said property belonging to the Jefferson Lumber Company, at public outcry, at the place designated in said order, and at such sale the said property was stricken off and sold to W. B. Chew, W. B. Ward, J. M. Bemis and Elijah Robinson, at and for the sum of thirteen thousand ($13,000.00) dollars; they, the said purchasers, being the highest bidders, and such purchasers having, as directed by said order of sale, paid at the date thereof, the sum of five thousand dollars, and having since paid to the Receiver, H. A. O'Neal, the sum of eight thousand dollars, being the full purchase price of said property, and on June 21st 1892, the said Commissioners, filed in this Court a report of said sale, and after fully considering said report, and it appearing to the Court that said sale was in all things made and conducted as directed in said order of sale; and upon the application of the Galveston National Bank, the said sale is, in all things, confirmed and approved, and the said Commissioners are hereby ordered to execute to the said purchasers, deeds and other proper conveyances to the property so sold subject to all legal claims embraced in the deeds of trust made by the said Jefferson Lumber Company to W. R. Camp as trustee, dated July 7th, 1891, which consists of all the real, personal and mixed property and choses in

action, a description of which is recorded in Minute Book "M," pages 397 to 447, which is here referred, to and made a part hereof, and the said Receiver, H. A. O'Neal, is hereby directed to at once deliver to said purchasers the property so sold, and all the rights, title and interest of the Jefferson Lumber Company, and the Receiver thereof, in and to any and all of said property, is hereby vested in said purchasers, subject to the deed of trust heretofore made to W. R. Camp, as trustee, by the said Jefferson Lumber Company, on July 7th, 1891.

It is hereby decreed that the property above described be delivered to said purchasers, subject to any and all charges or liabilities of every character and kind incurred by the Receiver in the management of the same, and said liabilities, so incurred by said Receiver, are hereby declared to be a lien upon all of said property, and that the liens shall apply to liabilities incurred by the Receiver in the management of said property.

And it is further ordered that the Receiver pay all costs in this behalf out of the funds in his possession. It is further ordered that the Receiver be discharged in all things, except to disburse the money in his hands in pursuance of the orders of this Court.

The State of Texas, }
County of Marion, } I, C. G. Graham, Clerk of the District Court of Marion County, Texas, do hereby certify that the foregoing is a true and correct copy of the original order approving sale of the property of the Jefferson Lumber Company, and discharging the Receiver of said Company, as the same appears of record in my office in book "N," pages 105 and 106.

Given under my hand and the seal of said
[SEAL.] Court, at office in Jefferson, Texas, this, 1st day of September, 1894.

C. G. GRAHAM, Clerk.

Endorsed: U. S. Chy. No. 38. The National Bank of

Commerce, of Kansas City, Mo., vs. the Kildare Lumber Company, et. al.

Testimony for, and in behalf of the defendants before Lewis S. Schluter. Commissioner.

Filed September 27th, 1894. C. Dart, Clerk. By W. E. Singleton, Deputy. Exhibits and instruments offered by T. J. Rogers, Assignee. Filed September 27th, 1894. C. Dart, Clerk. By W. E. Singleton, Deputy.

The State of Texas, }
County of Marion. } Know all men by these presents: That I, the Jefferson Lumber Company, a corporation created by the laws of Texas, with office at Jefferson, and with J. H. Bemis, President, of the County of Marion and State aforesaid, for and in consideration of the sum of ten dollars to us in hand paid by W. R. Camp, trustee in the two deeds of trust, executed by us on July 7th, 1891, and filed for record and registration in County Clerk's office in Linden, Cass County, Texas, on the 8th day of July, 1891, which are here referred to and made a part hereof, have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said W. R. Camp, trustee as aforesaid, of the County of Bexar and State of Texas, all that certain lots and tracts of land situated in Cass County, Texas, known and described as follows: All of fractional block No. (35) thirty-five, as laid down and described in the plat of the town of Kildare. See deed registered in record book K 2, pages 251 and 252; and also ten acres of land situated in Cass County, of H. R. survey of Howard Reams, joining and adjacent to survey on which the town of Kildare is situated, on a part of the land on which the lumber of the Jefferson Lumber Company is located, in the town of Kildare, Texas. The property hereby conveyed in said ten acres, is a lease which is fully described in deed dated April 23rd, 1890, and filed for record January 2nd, 1891, recorded January 8th, 1891,

in record O 2 pages 58 and 59, which is hereby referred to and made a part hereof. The object and purpose of this conveyance is the same as that expressed in deeds of trust from Jefferson Lumber Company to W. R. Camp, trustee, both dated January 7th, 1891, and registered and recorded in County Clerk's office, of Cass County, Texas, on July 8th, 1891, and for such trust only.

To have and to hold the above described premises, together with all and singular, the rights and appurtenances thereto in anywise belonging unto the said W. R. Camp, trustee as aforesaid, his heirs and assigns forever, and I do hereby bind myself and successors and heirs, executors and administrators, to warrant and forever defend, all and singular, the said premises unto the said W. R. Camp, trustee as aforesaid, and his heirs and assigns, against any person whomsoever lawfully claiming or to claim the same, or any part thereof.

Witness my hand and seal of the corporation
[SEAL.] this, 8th day of July, A. D., 1891.

JEFFERSON LUMBER COMPANY.

By. J. H. BEMIS, President.

The State of Texas, }
County of Marion. } Before me, Lee Sherrell, a Notary Public in and for said County and State, on this day personally appeared J. H. Bemis, President of the Jefferson Lumber Company known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he, as such president, executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this
[SEAL.] 8th day of July, A. D., 1891.

LEE SHERRELL,
Notary Public, Marion County, Texas.

EVIDENCE FOR PLAINTIFF IN REBUTTAL.

In the Circuit Court of the United States for the Eastern District of Texas.

The National Bank of Commerce of Kansas City, Mo.	Complainant.
vs.	
The Kildare Lumber Company, et. al.	Defendants.

STIPULATION.

It is hereby agreed that the depositions in the above entitled cause may be taken in short-hand and transcribed by the Stenographer, and the signature of the witnesses are hereby waived.

ELIJAH ROBINSON,
Attorney for Complainant.
MILLS, SMITH & HOBBS,
Attorneys for Defendants.

Depositions of witnesses produced, sworn and examined at the office of Elijah Robinson, at Room 24, Wales Building, in Kansas City, Jackson County, Mo. on the 19th, day of September, 1894, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, in a case pending in the Circuit Court of the United States within and for the Eastern District of Texas at Jefferson, wherein the National Bank of Commerce, of Kansas City, Mo., is complainant, and the Kildare Lumber Company, W. R. Camp, Geo. T. Todd, the Atlanta Bank, of Atlanta, Texas, the Citizens Bank of Jefferson, Texas, J. H. Bemis, W. B. Ward and L. S. Schluter, are defendants, on the part of said complainant.

Judge Robinson appeared for the complainant, and Wm. R. Smith, Esq. appeared for the defendants.

R. A. Long, of lawful age, being duly sworn, on his oath deposes and says:

DIRECT EXAMINATION, by Judge Robinson.

Question. What are your initials, Mr. Long?

Answer. R. A.

Q. Do you live in Kansas City?

A. Yes sir.

Q. What is your business.

A. Lumber.

Q. Were you in Jefferson, Texas, in 1893, in July about the first of July?

A. Yes sir.

Q. Do you know Mr. Bemis—J. H. Bemis?

A. Yes sir.

Q. Do you know Mr. Ward?

A. Yes, I met him at that time.

Q. Do you remember Charles F. Bemis?

A. Yes sir.

Q. Did you hear a conversation between Mr. Ward, J. H. Bemis, Charles F. Bemis and myself at that time?

A. Yes sir.

Q. Do you remember what day of the month it was that conversation took place?

A. It was on the 3rd day of July.

Q. Where was it?

A. In Mr. Bemis' office.

Q. Do you remember what the subject of the conversation was? (The defendant here objects to the above question, for the reason that the same is incompetent, irrelevant and immaterial; and no proper foundation has been laid for the same, the same being rebuttal evidence.)

A. Yes sir.

Q. State what it was? (Objected to by the defendant for the same reason as last above.)

A. It was concerning the indebtedness of Mr. Bemis and the Bemis Lumber Company, I think it was to the National Bank of Commerce, and the National Bank of Commerce interest in the Kildare Lumber Company.

Q. Do you remember the question being asked of Mr. Ward as to whether he had surrendered to Mr. Bemis the claim which he had held against Bemis and the Kildare Lumber Company? (Objected to by the defendant as not competent rebuttal evidence, for the reason that the attention of Mr. Ward, the person

above named, was never called to said conversation, no proper foundation being laid for the admission of such evidence.)

A. Yes sir.

Q. Do you remember what his reply to that question was? (Objected to by the defendant for the same reason as to the last above mentioned.)

A. I couldn't say, I could give you in substance, but couldn't give you the words.

Q. Well, give in substance, as near the language as you can. (Objected to by the defendant for the same reason as last above.)

A. That he hadn't done so, but felt disposed to do so whenever called upon. (The defendant moves to strike out the answer to the above question as not proper rebuttal, and no proper foundation was laid for the same.)

Q. Do you remember the question being asked Mr. Ward as to whether he hadn't made an agreement with Mr. Bemis to pay every dollar of his claim, or didn't expect Mr. Bemis to pay him in full. (Objected to by the defendant as not proper rebuttal evidence and no proper foundation has been laid for the question and answer, and as incompetent and irrelevant.)

A. Yes sir.

Q. I will get you to state what answer Mr. Ward gave to that question, if any, and just exactly what did occur when the question was asked? (Objected to by the defendant for the reason that nowhere in the testimony has the attention of Mr. Ward been called to any such conversation with this witness, and no proper foundation has been laid for the asking of said above question, and the same is in no way relevant or contradictory of any testimony given by said Ward.)

A. Mr. Ward hesitated when the question was asked, and before he answered or seemed to make an effort to answer, Mr. Bemis (J. H. Bemis) spoke up and said that he would answer that question for Mr.

Ward; that while there had been no agreement to that effect, that he didn't expect to see Mr. Ward lose a dollar.

Q. Do you remember what Charles Bemis said was his recollection or understanding of the agreement that was made about the claims of the Bank of Commerce against J. H. Bemis & Co., and the Jefferson Lumber Company that were subsequently taken? (Objected to by the defendant as no proper foundation has been laid for the admission of any such evidence; that the same is not proper rebuttal evidence, the attention of the said Charles Bemis never having been called in any evidence in this case taken to any conversation with this witness.)

A. My best recollection of the matter is that he stated that he thought, his impression was that when the Bank of Commerce took stock in the Kildare Lumber Company and then took a note, I believe of the Kildare Lumber Company for a certain amount, that those two amounts, that is, the stock in the Company and the note, was to take the place of these acceptances that Bemis had cashed at the Bank of Commerce.

Q. Do you remember what J. H. Bemis or Mr, Ward, either one, stated was his recollection of the agreement? (Objected to by the defendant, for the reason that the same is not proper as rebuttal evidence no foundation has been laid for the question by any interrogatories propounded to said Bemis or Ward; the same is irrelevant and immaterial.)

A. My mind is not clear as to that.

CROSS EXAMINED, by W. R. Smith.

Q. Where did you hear these conversations with the various parties?

A. In Mr. Bemis' office in Jefferson, Texas.

Q. What interest did you have in this controversy between the Bank of Commerce and the defendant Lumber Company?

A. Why I had no financial interest.

Q. How did you happen to be down there?

A. At Jefferson, Texas?

Q. At the time Judge Robinson speaks of?

A. I Went down to look over the property of the Kildare Lumber Company.

Q. At whose instances and request?

A. Bank of Commerce.

Q. Are you interested in the Bank of Commerce?

A. No sir.

Q. Do business there?

Q. No sir.

Q. You were doing business there at the time that you went down?

A. Yes sir.

Q. When were these conversations had with Mr. Ward?

A. I think that it was on the 3rd day of July in the afternoon,

Q. What Year?

A. 1893.

Q. You knew that the Bank of Commerce here had a good deal of the paper endorsed by J. H. Bemis and sold to the Bank by Bemis, did you not?

A. I had been told so.

Q. And was this—the time you had these conversations, had the arrangement been made by which the Kildare Lumber Company had been organized and the bank over here secured? (Objected to by the plaintiff because the witness hasn't stated that he knows about when the Kildare Lumber Company was organized or wether the Bank was secured or not.)

Q. Do you know when the Kildare Lumber Company was organized down in Texas?

A. No sir.

Q. At the time you were there had the property been sold by the commisioners that were authorized to sell the property of the Jefferson Lumber Company? (Objected to by the plaintiff, because the witness hasn't said that he had any personal knowledge of when that occurred.)

A. What was the question?

Q. I ask you if the property had been sold?

A. The Jefferson Lumber Company?

Q. Yes sir

A. I can only answer that in this way. My impression is that the Jefferson Lumber Company was in existence before the Kildare Lumber Company, and that the Kildare Lumber Company succeeded the Jefferson Lumber Company.

What I asked you was, at the time you detail these conversations had the Kildare Lumber Company been organized, and had it at that time succeeded the Jefferson Lumber Company?

A. My impression is that it had been organized, but whether it succeeded I don't know.

Q. Was there anything said in these conversations about the bank turning over the obligations it held?

A. I think there was.

Q. What was said about that?

A. As I remember it Mr. Bemis claimed that the bank has agreed to do that, to turn over these obligations.

Q. What was said about that?

A. Well, I don't know that there was anything especially said other than in the conversation they claimed that the Bank of Commerce hadn't done as they agreed to do in turning over these securities when taking this stock and this paper.

Q. Was Judge Elijah Robinson there?

A. Yes sir.

Q. What did he say in answer to this statement of Mr. Bemis?

A. He claimed that he never agreed to do it.

Q. Was any demand made by Mr Bemis in your presence for this security or this pape?

A. No sir, not that I remember of.

A. He merely claimed that that was the agreement with the bank?

A. Yes sir.

Q. Did he say when the agreement was made?

A. I think not.

Q. In the conversation that you had there with Charley Bemis, what did he say about the surrender of those obligations?

A. I had no conversation with Charley Bemis.

Q. Did you hear him say anything about the surrender of those obligations?

A. My recollection of the matter is, that the Bank in taking the stock in the Kildare Lumber Company, and in taking the paper of the Kildare Lumber Company, was to surrender the acceptances that Bemis & Company had cashed here.

Q. Did Ward say anything about that, or make any similar claim?

A. I am not sure as to that.

Q. They were all together, Ward and the two Bemis' and Judge Robinson and yourself?

A. Yes sir.

Q. And who else?

A. No one, I think.

Q. Did you have more than one conversation?

A. No sir.

Q. Then all you have detailed here that you heard, was in one conversation in which the persons mentioned above were present?

A. Yes sir.

Q. And don't you remember Ward saying about the Bemis obligations held by the Bank of Commerce about their surrender?

A. I am of the impression that something was said, but my mind is not clear on that, and I couldn't testify as to whether there was or not.

Q. You can't give the language of Mr. Ward in the conversation in which he talked about the surrender of the securities which he held against Bemis?

A. No sir.

Q. Then you have nothing more than an impression as to what was said, without being able to recall

the language?

A. Well, my impression is correct as to the meaning, but as to the language used I—.

Q. Then you understood Mr. Ward to say that from the readjustment of these claims, and the organization of the Kildare Lumber Company and the issuing of the stock that Bemis was entitled to the securities that he, Ward, held?

A. That was the only inference that I could get from it.

Q. And from that time Ward didn't claim the old obligations?

A. Well, you can draw your conclusions from the statement he made as well as I can. I don't know what he claimed any more than what he said.

Q. Do you recollect whether he said anything about having surrendered to Bemis—he had surrendered, or would surrender them?

A. Would surrender them.

RE-DIRECT EXAMINATION by Judge Robinson.

Q. Do you remember of the circumstances of Mr. Bemis, J. H. Bemis, undertaking to state what the contract was, and his son, Charley Bemis, stopped him, or at least as soon as he got through, telling him that he thought that he had made a mistake in stating the contract? (Objected to by the defendant as leading no proper foundation being laid for the question and not proper rebuttal evidence and incompetent.)

A. I don't know that I remember that.

RE-CROSS EXAMINANTION by Mr. Smith.

Q. How long were you in Jefferson?

A. I was there three or four hours, I think.

Q. And how long were you in the presence of these gentlemen engaged in talking about this matter?

A. Probably an hour or an hour and a half.

Q. You had no interest in the compromise of these debts?

A. None whatever.

Q. Nor did you go there with the idea of taking

any part in the adjustment of these matters?

A. We were in the lumber business and there was some probability, or thought to be, of the property being sold, and I wanted to investigate the property and see what there was of it and give them my advice. I went down there that day and was asked to go to Mr. Bemis' office with Judge Robinson.

Q. For what purpose did Judge Robinson want you to go to Bemis' office with him?

A. You will have to ask him.

Q. He din't tell you?

A. No sir.

Signature waived.

Sworn to before me on the day, within the hours and at the place in that behalf first aforesaid. My Commission will expire on the 13th day of June, 1895.

STUART CLARKENER,
Notary Public, Jackson County, Mo.

Elijah Robinson, of lawful age, being duly sworn, on his oath deposes and says:

DIRECT EXAMINATION.

Q. Do you know Thomas Byrne?

A. I do.

Q. Where does he reside?

A. I don't know where he resides.

Q. Did he ever reside at Jefferson, Texas?

A. That was my information; I met him at Jefferson, Texas.

Q. Did you have any conversation with him at any time in regard to the organization of the Kildare Lumber Company and the execution of the notes by that Company to the National Bank of Commerce? (Objected to by the defendant as not proper rebuttal evidence, as no proper foundation had been laid for the same in the examination of the said witness, Byrne.)

A. I didn't have any conversation with him further than in regard to the calculation of interest on claims which the Bank of Commerce held against the Jefferson Lumber Company and J. H. Bemis & Com-

pany. The Kildare Lumber Company was to execute notes to the Bank of Commerce for an amount equal to forty per cent of the claims which it held against the Jefferson Lumber Company and J. H. Bemis & Company and in addition thereto $3,250 and interest thereon and Mr. Byrne and myself both calculated the interest, and had some short conversation as to the total amount.

Q. Did any conversation take place between you and any person else in the presence of Mr. Byrne as to the surrender by the Bank of Commerce of claims which it held against the Jefferson Lumber Company and J. H. Bemis & Co? (Objected to by the defendant as not proper rebuttal evidence, no foundation having been laid therefor.)

A. I had no conversation with Mr. Byrne on that subject and had no conversation with any other person in his presence. At the time the Kildare Lumber Co. was organized, this calculation that I have spoken of was made, and there was some discussion between W. B. Ward and J. H. Bemis and myself as to the amount for which the Kildare Lumber Co should execute its notes and give stock to the Bank of Commerce, and the amounts for which Mr. Ward should receive the stock and notes of that Company.

Q. Did Mr. Thomas Byrne at any time ask you the question as to whom the claims against the Jefferson Lumber Company and J. H. Bemis & Company should be surrendered? (Objected to by defendant for the same reason as the last objection made by defendant.)

A. He did not.

Q. Did you at any time tell him that you supposed they would be surrendered to Mr. Bemis?

A. I did not.

Q. At the time the Kildare Lumber Company was organized and the time the calculations were made that you have spoken of, did Mr. Byrne ask you what your understanding was as to whom the claims above

mentioned should be surrendered to? (Objected to by defendant, as no proper foundation has been laid for the question, and not proper rebuttal evidence, incompetent and irrelevant.)

A. Mr. Byrne didn't at that time or at any other time, ask me any such question.

Q. Did you, at that time ask Mr. Ward what his understanding of that matter was? (Objection by the defendant, for the reason that no proper foundation has been laid for the question or any rebuttal evidence, Mr. Ward's attention never having been called to any such conversation, and he never having been interrogated regarding the same.)

A. I did not ask Mr. Ward any such question. The subject of surrender of claims was not mentioned at that time, and had never been mentioned prior to that time between Mr. Bemis and myself, or between myself and any other person. (The defendant moves to strike out the above answer as not responsive to the question; no proper foundation has been laid for the question or answer, and the same not being proper rebuttal evidence.)

Q. Were the notes of the Kildare Lumber Company executed and delivered to you while at Jefferson on the occasion mentioned?

A. They were not.

Q. Why not? (Objected to by the defendant as not proper rebuttal testimony and incompetent.)

A. One reason, and my recollection of the matter is, the principal reason was that other parties who, under the written agreement which had been made between W. B. Ward, John M. Bemis and myself, were entitled to stock in the company upon executing releases against any claim they might have on the property which the parties to that agreement had purchased, had not executed the release, and I wouldn't be positive, but it is possible that the commissioners who made the sale had not delivered the deed.

(The defendant moves to strike out the above

answer as not responsive to the question, and as not proper rebuttal evidence, and incompetent and irrelevant.)

Q. Did the fact that you did not have in your possession at the time all the acceptances which the Bank of Commerce held against the Jefferson Lumber Company and J. H. Bemis & Company, have anything to do with the failure to execute the deeds and take notes and deeds of trust during that visit of yours at Jefferson?

(Objected to by the defendant as leading, and not proper rebuttal evidence and incompetent.

A. I did not. Nothing of the kind was mentioned.

Q. What, if anything, was said on that occasion about the claim that the plaintiff bank held against the Southern Pine Lumber Company? (Objected to by the defendant as irrelevant and incompetent and not proper rebuttal and no foundation has been laid for the evidence sought to be testified to.)

A. When we made the calculation, it was suggested by some one, probably Mr. Bemis, I won't be positive about that, possibly by myself, that the claim had been collected by the Bank of Commerce, and, therefore, under the written agreement above mentioned, should not be included in the calculation. I then stated that when I returned home I would ascertain what the facts were about that matter and if it had been collected it should be deducted from the amount.

Q. What, if anything, was said about the claim against the Southwestern Lumber Company? (Objected to by the defendant for the same reason as the last question.)

A. Mr. Bemis said that we had a suit pending against the Southwestern Lumber Company and had levied upon property sufficient to pay the claim, and that in as much as we could get that claim, he thought that ought to be deducted also. In reply, I stated to him that while it was true we had levied upon property sufficient to pay the claim, and it would

probably exceed the amount of our claim, The National Bank of Norwich, Connecticut, had claimed the property we levied on, and had sued us in the U. S. Circuit Court at Kansas City, for $10,000, and that I was unwilling to make any deduction and take chances on the result of that suit. Mr. Bemis then said that he thought he could get that suit dismissed. I told him that if he would do so or agree to give a bond to protect the bank against any judgment that might be rendered, I would agree to have the deduction made. He said that he would not give any bond, but he thought that he could have the suit dismissed. I thereupon told him that I would not consent to the deduction and the matter ended there, (The defendant moves to strike out the above answer as not proper rebuttal evidence, no foundation has been laid in the examination of Mr. Bemis, and is incompetent and irrelevant.)

Q. Did you have any conversation during that visit to Jefferson, Texas, with Mr. L. S. Schluter? (Objected to by the defendant, as no foundation has been laid for the question, and it is not proper rebuttal evidence, the witness, Schluter, never having been interrogated regarding said conversation).

A. I probably had conversations with Mr. Schluter and Mr. Culberson. They had been assisting me in the suits which I had brought in the United States Court at Jefferson against J. H. Bemis and others.

Q. Did you have any conversation with Mr. Schluter as to surrendering any of the claims which the Bank of Commerce held against the Jefferson Lumber Company and J. H. Bemis & Company? (Objected to for the same reason as the last objection)

A. I did not. There was never any such taik between me and Schluter or between me and any other person else in the presence of Mr. Schluter, until long after the notes of the Kildare Lumber Company had been delivered to me and by me turned over to the Bank of Commerce. I remember that during my visit to Jefferson above mentioned, I had some

conversation with Mr. Schluter about a balance that he said would be in the hands of the receivers after paying expenses, and in which he told me that the Bank of Commerce would probably be entitled to as much as $1,000; but nothing whatever was said about surrendering any claims to Mr. Bemis, or about Mr. Bemis being entitled to the surrender of any claims. (Defendant moves to strike out the above answer as not proper rebuttal evidence, and no foundation has been laid for introduction of such evidence).

Q. Did you receive a telegram from Mr. Bemis, Mr. Ward and Mr. Schluter about the releases that were to be made by certain parties to the Kildare Lumber Company after you returned home from Jefferson on that occasion? (Objected to by the defendant for the same reason as above and calling for the contents of a written instrument, the telegram being the best evidence.)

A. I did, and I think that telegram is attached to the depositions in this case. The telegram, together with letter which I wrote Messrs. Schluter & Culberson after my return home, refreshes my memory as to the reason why the matter was not consummated while I was there.

Q. Did Mr. Schluter have anything to do with the making of the agreement between you, Ward, Chew and John M. Bemis? (Objected to by the defendant for the same reason as above.)

A. Nothing whatever.

Q. Did you at any time authorize Mr. Schluter to surrender to Mr. Bemis any of the claims held by the plaintiff bank above mentioned or to make any agreement for the surrender of the same.

(Objection by the defendant as leading, as improper rebuttal evidence, no foundation having been laid for the same, incompetent and irrelevant.)

A. A good long while after the execution of the notes and deed of trust by the Kildare Lumber Company to the Bank of Commerce and others I said to Mr

Schluter that I had no objection to surrendering the original claims upon which suit was brought at Jefferson inasmuch as the claims had been reduced to judgment, and the judgment would not be affected by the surrender of the claims. Mr. Schluter said to me that Mr. Bemis was very anxious to have these claims surrendered, because he claimed that he wanted to use them in some adjustment with some other persons, and that he couldn't see that the judgment would be affected by the surrender of them, and suggested that I consent to the surrender, and I did so. Mr. Schluter never received from me any authority, in any way, shape or form, to surrender any other claims, or to make any agreement for the surrender of any claims.

Q. Did you have a conversation with Mr. Ward and Bemis, in the presence of Charles F. Bemis and Mr. Long, about the first of July, at the office occupied by Mr. Bemis in Jefferson?

A. I did.

Q. What was said in that conversation as to whether Mr. Ward had surrendered his claim against the Jefferson Lumber Company and Mr. Bemis? (Objected to by the defendant, because no proper foundation has been laid for the same by any examination made by Mr. Ward and Mr. Bemis, and the other parties mentioned; that the same is not proper rebuttal evidence, incompetent, and no question was ever asked of any of the persons mentioned in the above question.)

A. I asked Mr. Ward whether he had surrendered the claims which he held, and he said that he had not, but would do so at any time they would demand it. I then said, "Mr. Ward, is there not an understanding between you and Mr. Bemis to the effect that he is to pay every cent of the claims you hold?" Mr. Ward hesitated about answering, and Mr. Bemis said, "I will answer that question for Mr. Ward, there is no agreement to that effect, but I don't intend Mr. Ward to lose a dollar." (The defendant moves to strike

out the last part of the answer as not responsive to question.)

CROSS EXAMINATION by Mr. Smith.

Q. You are the attorney who has been prosecuting these suits of the National Bank of Commerce against the Jefferson Lumber Company, Kildare Lumber Company and Bemis?

A. I have not prosecuted any suit against the Jefferson Lumber Company, that I remember. I presented a claim for allowance by the Receiver of the Jefferson Lumber Company, while the property was in the hands of the Receiver. I brought suit agaist J. H. Bemis & Company in the Federal Court at Jefferson on these claims—some of them—and I brought a suit subsequently against the Kildare Lumber Company on the notes held by the Bank of Commerce against said Company, and for the purpose of foreclosing a mortgage, procuring the appointment of a Receiver and so on, and made Mr. Bemis and other parties defendants.

Q. You are very friendly with Mr. Bemis, are you?

A. I havn't any admiration for him in the world.

Q. I didn't ask about the admiration, it is the question whether you were friendly or not. Isn't it a fact that you are hostile to him?

A. I don't know just how to answer that question. When Mr. Bemis and myself meet, we are very courteous to each other. I have always treated him courteously, and he always treated me in the same way. As I said before, I havn't any admiration for Mr. Bemis as a man. If you mean by friendly that I have an unkind feeling towards him, or would like to do him any harm or anything of that kind, I will say that I have no such feeling as that toward him. I simply havn't any admiration for him.

Q. Now you had down there at Jefferson a good many talks with Ward and other persons, Charlie Bemis and other persons, about the settlement of this indebtedness held by the Bank of Commerce, didn't you?

A. I never had any talk with Charlie Bemis about it. Don't remember that I had any talk with Mr. Ward about the settlement of the claims of the Bank of Commerce against the Jefferson Lumber Company and J. H. Bemis & Company. I did have a conversation with Mr. Ward as President of the Kildare Lumber Company about the settlement of the notes that the Bank had against that Company.

Q. You organized the Kildare Lumber Company, didn't you?

A. No sir, I didn't organize the Kildare Lumber Company.

Q. Under the arrangement you made for the purchase of the assets of the old Jefferson Lumber Company it was contemplated that a new company should be organized?

A. Well, you can read the contract and construe it for yourself.

Q. Now, you don't prize very highly these old securities, these old notes that the Bank of Commerce now holds which Bemis turned over to them originally, do you?

A. I don't know exactly what you mean by prizing them very highly.

Q. I mean this, you don't regard them as valuable property?

A. I don't know what you mean by valuable property.

Q. Do you regard them as having any value?

A. Yes sir.

Q. In what does their value consist?

A. It consists in possible ability to collect them.

Q. Collect them from Bemis?

A. Yes. I have understood, I don't know what the facts are, I have understood that the Jefferson Lumber Company hadn't anything. I will state however, that I have never made any effort to collect any of them from Mr. Bemis, or anybody else, further than obtaining judgment on some of them.

Q. Bemis wanted that paper turned over to him, didn't he?

A. If he wanted it turned over to him at the time the other paper was executed, I didn't hear of it. I had no information of that kind at that time. Subsequently I understood that he wanted it turned over to him or assigned to somebody else, I have forgotten just what the fact was now about that. But I had a list of the claims with me at his office at the time we made the calculation and he didn't say a word to me at that time about turning them over to him or about giving him any such agreement as he afterwards obtained from Mr. Schluter.

Q. Does the agreement with Mr. Schluter set out the settlement of the amount and number of the notes held by the Bank of Commerce?

A. That agreement will speak for itself.

Q. The question I ask is whether included in that are all the obligations held by the Bank of Commerce?

A. I don't remember whether I ever examined it with a view of ascertaining or not. I never paid much attention to it.

Q. Schluter was assisting you down there in the matter of getting these securities wasn't he?

A. When I returned home from Jefferson, after it became apparent that we couldn't consummate the transaction while I was there on account of these releases not having been procured, I prepared notes and sent them down to Mr. Schluter and also such resolutions as I thought ought to be passed by the board of directors, authorizing the execution of the notes and the deed of trust, and also by-laws for the Kildare Lumber Co., and asked Mr. Schluter to turn these over to the—well I say Schluter and Culberson, sent them to Schluter and Culberson and asked them to turn them over—no, I asked them to have these resolutions and by-laws adopted and to have the notes executed and when they executed the deed of trust to deliver the deed. I sent him a power of attorney to

execute a deed.

Q. Why is it that the Bank of Commerce is so persistent in its refusal, even after this settlement is made to turn over these old notes?

A. For the same reason that you would be persistent about turning over to somebody else something that belonged to you, something they had a right to.

Q. Have you testified before in this case?

A. Yes sir.

Q. By deposition?

A. Yes sir.

Q. Where, here or at Jefferson?

A. Here.

Q. And that testimony of yours was used as part of the direct evidence in the case?

A. I could not tell you; it hasn't been used at all. It was intended as part of it, as the direct evidence, and that part which might be considered cross examination was intendeded to be used by the defendant.

Signature waived.

Sword to before me on the day, within the hours and at the place in that behalf first aforesaid. My commission will expire June 13th 1895

STUART CLARKNER,
Notary Public, Jackson County, Mo.,

State of Missouri, }
County of Jackson } ss.

I, Stuart Clarkener, a Notary Public within and for the County of Jackson and State of Missouri, hereby certify that on the 19th day of September, 1894, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, at the office of Elijah Robinson at Room 24, Wales building, in Kansas City Missouri, in pursuance of a notice, and both parties appearing by their respective attorneys came before me said Notary Public, R. A. Long, and Elijah Robinson, who were by me severally sworn to testify the truth the whole truth and nothing but the truth in the case now pending in the Circuit Court of the United States

within and for the Eastern District of Texas, at Jefferson, Texas, wherein the National Bank of Commerce of Kansas City, Missouri, is complainant, and the Kildare Lumber Company and others are defendants, and the said witnesses were, after being duly sworn, examined and their examination reduced to writing, and by agreement hereto attached the signatures were waived in my presence.

And I further certify that both the said Long and the said Robinson are residents of Kansas City, Mo., which is more than one hundred miles from the City of Jefferson and State of Texas, where the above entitled Court is held.

In witness hereof I have hereunto set my hand and Notarial seal this the 19th day of September 1894.

My commission will expire June 13th, 1895.

STUART CLARKNER,
Notary Public, Jackson County, Mo.

Notary fees paid by the Complainant, amt, $11.70
S. CLARKNER, N. P.

Endorsed, U. S. Chy No, 38. The National Bank of Commerce of Kansas City, Mo., vs The Kildare Lumber Company, et al. Depositions of R. A. Long and Elijah Robinson taken by me on behalf of Complainant.

S. CLARKNER, N. P,

Filed September—,A. D. 1894.
C. DART, Clerk,
by W. E. Singleton, Deputy.

FINAL DECREE.

The National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Company, W. R. Camp, Geo. T. Todd, The Atlanta Bank, of Atlanta, Texas; Citizens Bank, of Jefferson Texas; J. H. Bemis, W. B. Ward and Louis S. Schluter.	Chy. No. 38. October 3rd, 1894

Now at this day said cause came on to be heard, and the said parties, plaintiff and defendant, appeared by their respective attorneys and announced themselves ready for trial, and thereupon the cause was submitted to the Court on the bill, answer of the several parties defendants, the cross bill of the defendant, T. J. Rogers and the evidence adduced; and the Court having heard the cause and duly considered the same, doth find that heretofore, to-wit: On the 7th day of July, 1891 the Jefferson Lumber Company executed to W. R. Camp as trustee, three deeds of trust, and thereby created a lien upon the following described property, to-wit: What is known as the Kildare & Linden railroad, running from the town of Kildare, in Cass County, Texas, on the Texas & Pacific Railway, in a north-westerly direction for a distance of about twelve miles to the town of Linden, Cass County, Texas; the property hereby conveyed includes all and singular the rights-of-way of such railroad, and the parcels of land constituting said rights-of-way, the road bed, bridges, culverts, and all spurs, bridges and switches of said railroad; all depots, depot grounds, tracks, station houses, engine houses, car houses, freight houses, wood houses, work houses, machine shops, and all locomotives, tenders, cars and other rolling stock or equipments used for operating and repairing said railroad or its spurs, branches or switches, or any part, or either, together with all the equipments or appurtenances whatso-

ever, thereunto belonging, whether now held or hereafter to be acquired, all franchises connected with or relating to said railroad, the construction, maintenance or use thereof, with all rights, powers, privileges, franchises, immunities and exemptions of every kind and nature appertaining to the said Jefferson Lumber Company, therewith and all the estate, right, title, interest, property, possession, claim and demands whatsoever in law as well as in equity, present or prospective of the said Jefferson Lumber Company in and to the same and every part and parcel thereof with the appurtenances thereto belonging. Also what is known as the Atlanta & Mount Pleasant Railroad, commencing at the City of Atlanta, Cass County, Texas, and running in a westerly direction about twelve miles, the property hereby conveyed includes all and singular the right of way of such railroad and the parcels of land constituting said rights of way, the road bed, bridges, culverts, and all spurs, branches and switches of said railroad, all depots, depot grounds, tracks, station houses, engine houses, wood houses, work houses, machine shops, and all locomotives, and all rails, ties, chains, machinery, tools and other implements used for operating and repairing said railroad, or its spurs, branches or switches or any part of either with all the equipments or appurtenances whatsoever thereunto in anywise belonging, whether now held or hereafter to be acquired and all branches connected with or related to said railroad, or the construction, maintenance or use thereof with all rights, powers, privileges, franchises, immunities and exemptions of every kind and nature appertaining to the said Jefferson Lumber Company in connection therewith, and all the estate, right, title, interest, property, possession, claim and demand, whatsoever in law as well as in equity present or prospective of the said Jefferson Lumber Company in and to the same and every part and parcel thereof with the appurtenances thereto belonging. Also the following

mill property, to-wit:

1 Ames steam engine, 18x24.
1 Stearns steam engine, 12x16,
2 Filer & Stowell engine, feed, 10x14.
1 " carriage and head blocks.
1 " edger.
1 " trimmer.
1 " saw dust and slab conveyor.
1 Curtis lath and colter.
1 boiler, 4 1-2x12.
1 boiler, 4 1-2x11.
1 Worthington pump.
1 Dean pump.

Together with all saws, belts, pulleys, shafting, and all machinery, attachments, appurtenances and parts, and all mill sheds, mill houses, platforms and trucks thereunto, in any wise belonging, or in any manner appertaing.

Also one planing mill, complete, situated at Atlanta, Cass County, Texas, consisting of:

2 boilers, 5x14.
1 Atfas steam engine.
1 Worthington pump.
1 26 inch Benjamin surfacer.
1 9 inch Benjamin matcher.
1 14 inch Hoyt matcher.
2 edgers.
1 resaw.
1 iron lathe.
1 wood lathe.
2 gummers.
1 gig saw.

Togther with all mill sheds, mill houses, platforms, trucks, etc., and all matcher heads, knives, belting, shafting, pulleys, saws and all machinery, attachments, appurtenances and parts thereunto in anywise belonging as above described, being situated upon the following lands, to-wit:

Situated on the west side of the Texas & Pacific Rail-

way, about six hundred feet southwest of the said Texas & Pacific Railroad Company's depot at the City of Atlanta, Cass County, Texas, upon the lots or land owned by the Texas & Pacific Railroad Company, out of the James Richey headright survey, and out of the southwest corner of said survey, all within the corporate limits of the City of Atlanta, Cass County, Texas, and on blocks known as Nos. 14, 15, 18, 19, 22, 23, 28, 29, in said city. Also one saw mill and machinery complete, situated in Kildare, Cass County, Texas, consisting of:

1 set E. P. Allis cariage head blocks and carriage.
1 Hill steam log turner.
1 Prescott steam feed.
1 E. P. Allis saw frame.
1 Filer & Stowell edger.
1 Murry trimmer.
1 Hoyt Bros. No. 2 1-2 surfacer.
1 Stearns steam engine.
1 Hallbird steam engine.
2 Stearns boilers.
Also one pump house containing:
1 Worthington pump.
1 Upright steam boiler.
3000 feet of iron pipe.

Together with the mill houses, mill sheds, platforms, trucks, all saws, belts, pulleys, shafting, and all machinery, attachments, appurtenances and parts thereunto in any wise belonging, or in any manner appertaining. Also one planing mill and machinery complete, situated at Kildare. Cass County, Texas, consisting of:

1 Knowles pump.
3 Erie City Iron Works boilers.
1 American Twist Drill Company's knife sharpener.
1 engine 12x14.
1 Hoyt Bros. No. 2 surfacer.

1 " No. 10 matcher.
1 " No. 11 matcher.
1 " Resaw
1 " Gang edger.
1 S. A. Wood moulder.
1 Hoyt Bros. resaw.
I Kentucky lathe Machine.
1 Dufour Bros. picket header.
2 Lumber dollies.
20 Lumber buggies.
1 Sturdevant blower.

Together with the mill houses, mill sheds, dry houses, forms, trucks, and all matcher heads, knives, belting, shafting, pulleys, saws, and all matcher attachments, appurtenances and parts thereunto in anywise belonging, or in any manner appertaining, said saw and planing mills, machinery, attachments and appurtenances thereunto belonging as above described, being situated upon the following described lands, to-wit: Situated on the west side of the Texas and Pacific Railway Company track at Kildare, Cass County, Tex., and upon the land deeded to the Jefferson Lumber Company by D. H. Zachery and wife, on April 11th, 1887, recorded April 23rd. 1887, book J2 pps 12, 13 and 14 of records of deeds in and for Cass County, Texas, and the same being the part of the John M. Watson survey. Also one saw mill and machinery complete in Cass County, Texas, about 3 or 4 miles southwest from Kildare, and known as Mill No. 2 of the Jefferson Lumber Company, consisting of:

1 Atlas engine.
1 " saw rig.
1 Filer & Stowell head blocks and carriage.
1 3 Roll gang edger (Branch, Crooks & Co.)
1 Branch, Crooks & Co. trimmer.
2 24 feet boilers.

Together with the mill houses, mill sheds, dry houses, platforms, trucks, and all saws, belts, pulleys, shafting, and all machinery attachments, appurtenances

and parts thereunto in any wise belonging, or in any manner appertaining to said mill situated on what is known as the Curtis Jernigan headright survey.

1. 640 acres of land situated in Cass County, Texas, of the Joseph Jones survey, No. 1183, certificate No. 17, and the metes and bounds of said tract of land is fully described in deed from E. C. Frazier to Jefferson Lumber Company, dated 10th day of February, 1891, and filed for record in Cass County, February 28th, 1891, and duly recorded 12th day of March, 1891, in the records of Cass County, in volume O2, on pages 182, 183 and 184, and which deed is here referred to and made part hereof.

2. 175 8-10 acres of land situated in Cass County, Texas, the head right survey of Peter M. Keaton, the same being lot No. 4, as partitioned by the order of the District Court of Cass County, Texas, to John H. Everett, and the metes and bounds of said land is fully described in deed from A. C. Morrison and wife to Jefferson Lumber Company, dated June 19, 1885. and filed for record July 9th, 1885, and duly recorded in the records of Cass County, on the 10th day of July, 1885, in record book No. G 2, page 494, which said deed and record is here referred to and made a part hereof.

3. Block No. thirty-four (34) situated in the town of Kildare, Cass County, Texas, as laid down and described in the plot of the town of Kildare, the same deeded to the Jefferson Lumber Company by R. C. Stone, Sr., and his wife, Almer Stone, deed dated May 25th, 1886, and filed for record, December 22nd, 1886, and duly recorded in records for Cass County, December 23rd, 1886, in record book No. 12, page 449, which said deed and record is here referred to and made a part hereof.

4 320 acres of land situated in Cass County (Davis), Texas, S. 78° W. from Linden, the same land patented on the 11th day of October, 1870, by E. J. Davis, Governor, and Jacob Keuchler, Commis-

sioner of the General Land Office; patent (W. Smith) is here refered to and made a part hereof. And also the deed from W. H. Cunliff to the Jefferson Lumber Company, dated May 10th, 1885, and filed for record July 9th, 1885, and duly recorded in Cass County July 13th, 1885, in Record Book No. G. 2, page 502.

The following tract of land situated in Cass County Texas: (1000) one thousand acres lying on the waters of James Bayou surveyed by virtue of part of the headright certificate of George S. young, and patented to said Young on May 25th 1853, patent No. 622 Vol. 10. Beginning at the N. W. corner of said survey, and running thence east two thousand two hundred and twenty (2220) vrs. to the north-west corner of a tract of 500 acres sold to J. M. Bivens. Thence (2542) two thousand five hundred and forty-two vrs. Thence West (2220) two thousand two hundred and twenty vrs. to the west boundry of the said Young survey. Thence north (2542) two thousand five hundred and forty-two vrs. to the beginning. Also (320) three hundred and twenty acres being part of a survey of 480 acres located by J. R. Mills by virtue of certificate 843 issued to the B. B. B & C. R. R. Co., and patented to said Miles as assignee. which said patent and record thereof, is here referred to and made a part hereof, and fully described in deed hereafter referred to and made a part hereof. Also (640) six hundred and forty acres about six miles 58.9 E. of the town of Linden surveyed by virtue of land script No. 3—8, issued by Commissioner of Claims on January 6th 1859 to the B. B. B. & C. R. R. Co, and patented on the 24th of October, which patent and the deed hereinafter described are here referred to and made a part hereof. Also (545) five hundred and forty-five acres in Cass County, being a part of the headright survey of George S. Young, fully described in deed from James M. Bowman and P. Lanier evidenced by deed dated December 18th 1869, recorded in book B 2 pages 513 etc. to which reference is here made

for more perfect description save and except the following tracts heretofore sold by P. Lanier before conveying to me Horace Blinn, viz: To Thomas Leonard 100 (one hundred) acres out of the N. E. corner of said land; to C. S. Shelton, 92 acres out of the east end of said land, to W. E. Summers, 700 acres out of the west end of said land, and to H. P. Lee 500 acres out of the north side of said land, leaving a balance of 545 acres of the George S. Young survey, which is hereby conveyed. Also 800 (eight hundred) acres conveyed to Horace Blinn March 8th, 1884, by W. D. Berry and wife, being a part of the James Clark headright survey, lying near to and north of Linden, made by virtue of Certificate No. 22 issued by the Board of Land Commissioners of Red River County on February 1st, 1888, patent record in Cass County in Record Book blank, page 7, and made a part hereof. Also 114 2-10 (one hundred and fourteen and two-tenths) acres of land, being the western part of the John Hall 320 acre pre-emption survey granted to the said John Hall by the State of Texas by patent No. 200, Vol. 42, dated July 13th, 1871, lying on Frazier Creek, about 5 1-2 miles N. and 73 1-2 E. from the town of Linden, the field notes to which are fully set forth in said patent, and the deed hereinafter referred to, which patent and deed are made a part hereof, for better description of said land. Also 320 (three hundred and twenty) acres of land in Cass County, the headright survey of Roland Barring, two, patent No. 2, Vol. 6, dated September 2nd, 1850, on the west side of Frazier Bayou, about 18 miles above Monterey, by virtue of bounty warrant No. 679, issued upon a Certificate No. 8, by Ben T. Hill, Adjutant General on the 2nd day of September, 1850 which is fully described in said patent and deed of Horce Blinn to Jefferson Lumber Company, which are here referred to and made a part hereof.

Also 320 (three hundred and twenty) arcres of land patented to N. C. Graham assignee of R. F. Whita-

ker. lying about 3 1-2 miles north, 53° east of Linden, and fully described in said patent, and said deed of Horace Blinn to the Jefferson Lumber Company which are here referred to and made a part hereof. Also 553 1-2 five hundred and fifty-three and one-half acres of land in Cass County, being a part of the Sherrod Dunman Survey and being lot No. 3 (three) and fully described in deed from Horace Blinn to Jefferson Lumber Company, hereinafter referred to and made a part thereof, and for better description see plat on record book No. 2, page 131. Also lot No. 2, (two) of said Dunman headright survey which is fully described in the aforesaid plat and in deed of Horace Blinn, which is here referred to and made a part hereof, containing 380 1-2 acres of land. Also 79 15-100 of land being Thomas J. White's interest as assignee of certificate No. 107 issued to B.B.B. & C. R. R. Co., April 19th, 1859, which is fully described in deed from Horace Blinn hereafter described which is here referred to and made a part hereof. Also 160 (one hundred and sixty) acres patented to Daniel Frazier situated on James bayou about 3 miles south, 40 east from Linden, which said patent and the deed of Horace Blinn hereinafter described, in which said land is fully set forth by metes and bounds are here referred to and made a part hereof. Also 160 (one hundred and sixty) acres of land in Cass county lying on the waters of James bayou, being the Riley Truitt headright survey 4 miles south from the town of Linden, the field notes to which are fully set forth in the deed of Horace Blinn to the Jefferson Lumber Company, which is hereinafter described and here referred to and made a part hereof. Also better and more particular description of the lands herein conveyed under subdivision 5, the deed from Horace Blinn to the Jefferson Lumber Company, dated the 3rd day of September 1885, and filed for record in Cass County October 3rd, 1885, and duly recorded in record book No. F 2, pages 631 to 637, inclusive on the 9th day

of October 1885, and the records thereof are here referred to and made a part thereof.

6. 90 acres of land situated in Atlanta, Cass County, Texas, a part of the Jane Richie headright survey, being a part of the premises sold to C. J. W. Mercer, on August 4th, 1886, by J. D. Johnson and his wife, dated April 7th, 1886, and filed for record March 28th, 1888, and duly recorded March 29th, 1888, in record book K 2, on pages 593 and 594, which said deed and the record thereof is here referred to and made a part hereof.

7. 320 acres of land situated in Cass County, Tex., the Jessie Waller, survey, and fully described by field notes in deed from M. D. K. Taylor and S. W. Mosley, executors of the will of Samuel F. Mosley, deceased, to the Jefferson Lumber Company, dated August 10th, 1889, and filed for record November 5th, 1889, and duly record on the 7th day of December, 1889, in the records of said County, in Vol. 2, on pages 403-4, which said deed and the record is referred to and made a part hereof.

8. 208 acres of land, situated in Cass County, Texas, being a part of the Wm. Donohue's headright survey, beginning at the N. E. corner of said survey at stake from which a black Jack bears "S W 10 varas" and a pine "S 48 W 9 varas" both marked W. D. Thence S. by the E. line of the same 1,243 varas. Thence west 944 3-4 varas more or less. Thence N. 1243 varas to the N line of said H. R. Survey. Thence by said N line 944 3-4 varas more or less to the place of beginning being the same land described in deed from J. F. Jones to the Jefferson Lumber Co., dated Agust 22nd, 1885, and filed for record August 24th, 1885 in records of Cass County, in record book No. G2, page 588, which is here referred to and made a part hereof.

9. 234 1-3 (three hundred and thirty-four and 1-3) acres of land situated in Cass County more or less patented by the State of Texas to Fisher and Miller

on the 24th day of July, A. D., 1874, by patent No. 176, Vol. No. 42, K 3rd class, which said patent and the deed of Jacob Keuchler to Jefferson Lumber Company dated May 7th, 1891, and filed for record June 2nd, 1891, and duly recorded June 18th, 1891, in the records of Cass County, in Vol. O 2, on pages 306 and 307, and here referred to and made a part hereof.

10. A certain tract of land situated in Cass County, Texas, about 2 miles E. 45 S. from Linden, and surveyed by virtue of certificate No. 8—362, dated 7th of September, 1857, issued to James W. Givens for 125 1-5 acres of land. Beginning at the northeast corner of a 160 acre pre-emption survey for James W. Campbell. Thence east by said south line of a league and labor survey for James Clark, at a stake from which a pine bears S. 22 E. 9 1-2 varas. S. Thence east by the said south line at 84 1-2 varas, a stake from which a post oak bears south 66 varas. Thence south at 84 1-2 varas. from which a pine bears N. 53 W. 12 1-2 varas. Thence west at 841 1-2 varas. the east line of said Campbell survey, a stake from which a pine bears N. 19 E. 17 varas. Thence north by said east line at 853 varas. to the place of beginning, and fully described in deed from C. C. Galloway to Jefferson Lumber Company, dated March 16th, 1887, and filed for record March 17, 1887, and duly recorded March 25th, 1887, in records of Cass County, Vol. 12, pages 565 and 569.

11. The exclusive use of a strip of land 100 feet wide, for the purpose of building and operating a railroad tramway upon, over and across the following described tract of land situated in Cass County, Texas, and being a part of the Peter M. Keaton survey, about three miles west of Atlanta known as the J. B. Everett old place, containing two hundred and sixty-two acres. being the same strip of land located on said 252 acres, survey by said Company for the purpose of building a railroad or tramway, and described in deed from M. A. Birmingham and others to Jefferson Lumber Com-

pany, dated March 18th, 1886, and filed March 28th, 1888, and duly recorded March 29th, 1888, in record book K2, pages 395 and 399, which is here referred to and made a part hereof.

12. 160 acres of land situated in Cass County, Texas, the same being the headright of E. T. Jackson, transferred by Thomas Heath to Wm. Donaldson, and is on Black Cypress about 8 1-2 miles S. 18 W. from Linden, and patented to E. T. Jackson, April 19th, 1861, patent No. 439, Vol. 12 Bounty, 150 acres, which patent and deed from John M. Donaldson and wife, Elizabeth Donaldson, for more particular description of said land and here referred to and made a part hereof. The said Donaldson deed to Jefferson Lumber Company is dated May 29th, 1885, and filed for record July 13th, 1885, and duly recorded July 13th, 1885, record book No. G 2, page 500.

13. 1 15-100 acres of land situated in the town of Atlanta, Cass County, Texas, a part of a survey in the name of Jane Richie, beginning west of the railroad 81 varas. S. of S. E. corner of J. E. Baily homestead, then north 81 varas. to said Baily, S. E. corner, thence west 137 varas., thence S. 16 varas., thence a southeasterly direction one hundred and fifty varas. to the place of beginning, which is fully described in deed dated December 9th, 1886. from R. P. Coke and J. M. Adams to Jefferson Lumber Company, filed for record December 22nd, 1889, and recorded December 23rd, 1889, in book 2, page 450-1, and which is here referred to and made a part hereof. All the timber, cypress and pine, saw timber and merchantable pine timber, sold and transferred to the Jefferson Lumber Company, heretofore with the right and license to enter upon the lands upon which said timbers are standing and growing, and take and remove the same therefrom, and to make, construct and operate railroads and tramways over and across said lands, all of which will more fully appear from the description, and privileges and powers granted in the grantors' deeds

thereof to the said Jeffersen Lumber Company, which are more definitely described and made a part hereof hereinafter as follows:

All the pine saw timber standing on 100 acres of land of the John Lick survey, in Cass County, and described in deed from W. H. Rutland and J. E. Morris to the Jefferson Lumber Company dated December 19th 1889, and Filed for record May 3rd 1890, and recorded May 5th 1890, in Volume M 2 page 273.

2. All the timber standing on 242 acres Dixon Dyer heudright survey in Cass County, and known as the J. W. Griffin place, and fully described in deed from M. E. Griffin to Jefferson Lumber Company, dated July 24th 1890, and filed for record July 28th 1890, and recorded August 2nd 1890, in Vol P 2 pages 28-9 here referred to and made a part hereof.

3. All the timber lying and growing on fifty acres of land of Dixon Dyer survey of Cass County, and fully described in deed from Allen Mays to Jefferson Lumber Company, dated July 26th, 1890, and filed for record July 28th, 1890, and recorded August 2nd, 1890, on pages 430-31, which is referred to and made a part hereof.

4. All the pine timber suitable for saw mill purposes standing, lying and growing on 320 acres of land in Cass County and particularly described in deed from J. N. Simmons to Jefferson Lumber Company, dated January 13th, 1888, and filed for record March 12th, 1888, and recorded March 13th, 1888 in book K 2 pages 231 and 232, which is here referred to and made a part hereof.

5. All the merchantable pine timber, standing, lying or growing on 80 acres of land of the J. A. Willborn headright survey in Cass County, fully described in deed from C. R. Cole to Jefferson Lumber Company, dated January 7th, 1891, and filed for record January 12th, '91, and recorded January 15th, '91, in Vol. J, 2, pages 66 and 67, which is here referred to and made a part hereof.

6. All the merchantable saw timber standing, lying and growing on one hundred acres of land in Cass County, of the William Wilson headright survey, and fully described in deed from F. C. Price to Jefferson Lumber Company, dated December 10th, 1890, and filed for record January 8th, 1891, in Vol. I, 2, on pages 56 and 57, which is here referred to and made a part hereof.

7. All pine saw timber on 60 acres of K. A. Willborn headright in Cass County, and fully described in deed from J. E. Bynum to Jefferson Lumber Company, dated December 23rd, '90, and filed for record January 3rd, '91, and recorded January 5th, '91, in Vol. J, 2, pages 47 and 48 which is here referred to and made a part hereof.

8. All pine saw timber on 900 acres part of A. D. Duncan league in Cass County, and fully described in deed from J. M. Lockett to Jefferson Lumber Company, dated May 5th, '91, and filed for record May 14th, '91, and recorded May 15th, '91, in Vol. M. page 427, which is here referred to and made a part hereof.

9. All that certain pine saw timber situated on 553 1-2 acres of the K. A. Willborn survey, in Cass County which is fully described in deed from Royal Lockett to E. W. Fant, recorded in book T, page 28, and also in deed from said Fant to Jefferson Lumber Company, dated June 1, '91, and filed for record June 3rd, 1891, and recorded June 18th, '91, Vol. M 2, page 431, both of which are here referred to and made a part hereof. Also 98 acres of the K. A. Welborn survey, deeded by W. W. Woodward to E. W. Fant, described in deed of record in Vol. E 2, page 626, and in deed from said Fant to Jefferson Lumber Company, both of which are here referred to and made a part hereof.

10. All the pine timber situated on 72 acres of the M. D. Frazier H. R. survey in Cass County, and fully described in deed from J. R. Hedges to Jefferson Lumber Company, dated January 1889, and filed for record January 14th, '91, in Vol. J, 2, pages 64 and 65

which is here referred to and made a part hereof.

11. All merchantable pine saw timber on 160 acres of the Carroll Lummons survey in Cass County, and the William Halbun survey about 8 miles south of Linden, and fully described in deed from J. H. Lockett to the Jefferson Lumber Company, dated September 26th, '90 and filed for record 2 pages 57 and 58 which is here referred to and made a part hereof.

12. All the pine and cypress timber on 277 acres of the T. J. Forster survey in Cass County, and fully described in deed from D. B. Simmons to Jefferson Lumber Company, dated October 15th, '86, and filed for record November 17th, '86, and recorded in Book 12 pages 428 and 429, which is here referred to and made a part hereof.

13. All pine timber on 450 acres of the Evan Watson H. R. survey in Cass County, and fully described in deed from J. M. Driver and wife to Jefferson Lumber Company, dated May 31st, '89 and filed for record June 7th, '89 in Vol. 2, page 137, which is here referred to and made a part hereof.

14. All pine timber suitable for making lumber situated on 140 acres of the Oliver 212 acres tract of the J. R. Boyd H. R. survey in Cass County, and fully described in deed from A. J. Oliver to Jefferson Lumber Company, and filed for record December 17th '90, and recorded December 18th, '90, in Vol. N 2 page 274, which is here referred to and made a part hereof.

15. All pine timber on 160 acres of the R. J. Wilson headright survey in Cass County, and described in deed from Thos. Lanier to Jefferson Lumber Company dated May 27th, '89, filed for record May 27th, '89, and recorded May 27th, '89, in Vol. 2, page 119, which is here referred to and made a part hereof.

16. All the pine saw timber on 245 acres, part of the Howell A. Jones and H. A. Taylor surveys in Cass County, and fully indeed from Mollie A. Howell to Jefferson Lumber Company, dated May 17th, '90, and filed for record June 17th, '90, and recorded in

Vol. P 2, pages 337 to 379 on June 18th, 1890, which is here referred to and made a part hereof.

17. All pine saw timber on 200 acres of H. Howell and A. Jones H. R. survey in Cass County, and fully described in deed. B. F. Sloan to Jefferson Lumber Company, dated May 17th, 1890, filed for record June 17th, 1890, and recorded Vol. 2, pages 379, 380 on June 18th, '90, which is here referred to and made a part hereof.

All those certain lots and tracts of land situated in Kildare, Cass County, Texas, known and described as follows:

All of fractional block No. (35) thirty-five as laid down and described in the plot of the town of Kildare; see deed register in Record Book K 2, pages 251-52; and also ten acres of land situated in Cass County, of H. R. survey of Howard Reams survey, and adjacent to survey in which the town of Kildare is situated, and a part of the land on which the timber of the Jefferson Lumber Company is located in the town of Kildare, Texas. The property hereby conveyed in the said ten acres is a lien which is fully described in deed dated Aprll 23rd, 1890, and filed for record January 2nd, 1891 and recorded January 8th, 1891, in record Q 2, pages 58 and 59, which is here referred to and made a part hereof.

That by the terms of said deeds of trust, the claim of the Citizens Bank of Jefferson, Texas, herein represented by T. J. Rogers, assignee, and now amounting to the sum of $11,951.36, was secured, and the said Rogers as assignee as aforesaid has a valid and subsisting lien on said property for the payment of said claim; and the Court doth further find that on the 13th day of July, 1892, the said Kildare Lumber Company made, executed and delivered to the said Louis [illegible] Schluter as trustee a deed of trust as in complainant's bill herein set forth, whereby it created a lien on the property therein described for the payment of the notes herein by the said complainant the National

Bank of Commerce, of Kansas City, Missouri, sued on, that there is due, and owing, from said Kildare Lumber Company to said National Bank of Commerce, of Kansas City, Missouri, the sum of $33,266.00, bearing interest at the rate of 6 per cent. per annum. That there is now due said W. B. Ward on the notes in said deed of trust mentioned, the sum of $5,099.25, bearing interest at the rate of 6 per cent. per annum, that the said National Bank of Commerce, of Kansas City, Missouri, and said W. B. Ward, have a valid and subsisting lien on said property, in said deed of trust described, for the payment of said amounts due thereon respectively as aforesaid, and that said property, in said deed of trust made by said Kildare Lumber Company as aforesaid, is described as follows:

At Kildare: One locomotive, 24 logging cars, 1 box car, 1 passenger coach, 1 hand car, 2 push cars, twelve (12) miles of railroad, known as the Kildare and Linden Railroad together with the stations at Kildare and Linden, section houses, sidings and everything used in connection with said railroad; also the extension of said road made by H. A. O'Neal, Receiver of said Jefferson Lumber Company, also planing mills at Kildare, and all fixtures and everything used in connection therewith; also two saw mills and all fixtures known as the Kildare and Number Two mills, and also miscellaneous property, all of which said property above mentioned, is fully described in Exhibit "A" attached to O'Neal and Allday's report of sale filed in the above cause June 21st, 1892, which is now referred to and made a part of this decree. Also the following described property at Atlanta, Cass County, Texas, to-wit: One saw mill and fixtures; also planer and two locomotives and logging cars, blacksmith shop, tools, etc., and about twelve (12) miles of railroad known as the Atlanta and Mt. Pleasant R. R., together with sidings, etc., and everything used in connection with said road. Also miscellaneous property, a full

description of the property above mentioned. will be found in Exhibit "B" attached to H. A. O'Neal and E. A. Allday's report of sale, filed by them in the above cause, June 21st, 1892, which said exhibit is now referred to and made a part of this deed. Also trial balances of accounts of the Jefferson Lumber Company, due on the 21st day of July, 1891, showing bills receivable of two hundred and thirteen thousand six hundred and thirteen-one hundredths, which were deposited by J. H. Bemis, President of the Jefferson Lumber Company, prior to July 21st, 1891, with various and divers persons as collateral to secure debts of said Company, and all of which items will fully appear in the exhibit attached to said report and marked J, which exhibit is now referred to and made a part of this deed.

Also the following described real estate situated in Cass County, Texas, to-wit:

104 3-4	Acres of land	Wm. F. Young	Survey
420	"	B B B & C R R Co	"
1,535	"	Curtis Jamison	"
521	"	Benjamin Hawkins	"
916 8-10	"	"	"
341	"	"	"
521	"	"	"
225	"	John Lick	"
450	"	Henry Warnell	"
881	"	Lewis Cateron	"
397	"	John Davis	"
75	"	John McCurley	"
116 2-3	"	"	"
200	"	Robt. Maxwell	"
400	"	"	"
800	"	"	"
200	"	"	"
100	Arces of land	James Jackson	Survey
190	"	Evan Watson	"
540	"	W. F. Young	"
300	"	James Berry	"

132	"	.....	Henry Brown	"
1,660 1-2	"	.....	M. D. Frazier	"
533 1-3	"	.....	"	"
88	"	.....	Andrew Hampton	"
380	"	.....	"	"
427	"	.....	"	"
97	"	.....	"	"
329 3-4	"	.....	"	"
1,476	"	.....	James Brown	"
557	"	.....	James Backman	"

For a more perfect description of the 31 tracts above mentioned, a reference is hereby made to a deed from the Jefferson Lumber Company to Erastus Jones, dated July 1st, 1891 which said deed is recorded in the office of the County Clerk of Cass Co., Tex., Deed Register 2, pages 383 and 388 inclusive. Also the following tracts of land situated in Cass County, Texas:

1,600	"	.....	James Clark	"
1,405	"	.....	"	"
160	"	.....	"	"
1,312	"	.....	Wm. Donahue	"
932	"	.....	"	"
320	"	.....	R. C. Graham	"
480	"	.....	S. H. Walker	"
w57 1-2	"	.....	J. S. Walker	"
200	"	.....	Evan Watson	"
100	"	.....	John Noll	"
175	"	.....	John Davis	"
470 1-2	"	.....	Henry Warnell	"
55	"	.....	T. J. Foster	"
397	"	.....	John Davis H. R.	"

For more particular description of the last named fourteen (14) tracts of land, a reference is herein made to a deed from the Jefferson Lumber Company to W. B. Ward, dated July 28th, 1891, which said deed is duly recorded in the County Clerk's Office, Cass County, Texas, in Deed Register 2, pages 228—230, inclusive.

Also the following described tracts of land situated

in Cass County, Texas:

140	Acres	B.B.B. & C.R.R. & Co.	survey.
Abstract 131.			
1,545	"	Geo. S. Young	"
114	"	John Hall	"
320	"	Richard barrington	"
934	"	S. Denman	"
70	"	B.B.B. & C. R. R. Co.	"
160	"	M. D. Frazier H. R.	"
800	"	James Clarke	"
186 2-3	"	Wm. Smith	"
320	"	B.B.B. & C. R.R. Co.	"
320	"	B. F. Whitaker	"
175	"	B. M. Keeton	"
160	"	E. T. Jackson	"
125	"	J. M. Givins	"
320	"	Jessie Walling	"
Block No. 34 in the town of Kildare.			
640	Acres	Joseph Jones	"
1 12-100	"	Jane Richie	"
9	"	"	"
334 1-3	"	Foster and Miller	"

Right of way purched from M. A. Birmingham and Everett or a portion of P. M. Keeton survey.

208	Acres	William Donohue	survey.
160	"	R. Brett	"

For a more perfect description of said last named twenty three tracts of land, a reference is hereby made to a deed of trust from the Jefferson Lumber Company to W. R. Camp, trustee, dated July 7th, 1891, and recorded in County Clerk's Office, Cass County, Texas, in Record book D of mortgages, 199 to 215 inclusive.

Also 834 accres of land situated in Cass County, Texas, being a portion of the Henry Buckner H. R. Survey, being same land deeded by J. H. Bemis July 7th, 1891, said deed is recorded in County Clerk's office. Cass County, Texas, in deed record 2, page 326.

Also 74 1-2 acres A. E. Manuel H. R. Survey, deeded by John Allison to Whitaker and Galloway,

March 4th 1885, which said deed is recorded in County Clerk's office, Cass County, Texas, in deed record G, page 206, which said deed is now referred to and made a part thereof.

Also 85 acres of land a portion of J. M. Watson survey, being same land deeded by D. H. Zachry to the Jefferson Lumber Company, April 11th, 1887, which said deed is recorded in book J, page 12, in County Clerk's office, Cass County, Texas.

Also 283 1–3 acres a portion of the John McKerley survey deeded from D. D. Dodd to Jefferson Lumber Company, July 9th, 1891, in which said deed is recorded in County Clerk's office, Cass County, Texas, record book M, page 442; the last four named surveys are located in Cass County, Texas.

Also pine timber upon the following named surveys in Cass County, Texas, 160 acres Wm. Hutton, deeded from J. O. Lockett to the Jefferson Lumber Company, September 26th. 1890, said deed is recorded in the County Clerk's office, Cass County, Texas, in Book 2, page 57.

Also 900 acres R. C. Graham survey deeded by F. D. Latham to the Jefferson Lumber Company, deed not of record.

Also 239 acres E. Frazier, P. Price and O. F. Halcomb surveys, deeded by J. W. Smith to the Jefferson Lumber Company, November 21st, 1889, which said deed is recorded in County Clerk's office, Cass County, Texas, in deed record O, page 569.

Also 202 acres W. B. Wilson and J. M. Boren, survey, deeded from J. L. Stone to the Jefferson Lumber Company May 1888; said deed recorded in County Clerk's office in deed record L, page 393. Also the right-of-way over the following deacribed lands, 303 acres of the John Lick Survey, deeded by J. A. Duncan and wife to the Jefferson Lumber Company, March 4th, 1890, the deed is recorded in the County Clerk's office Cass County, Texas, in read record N, page 177; 320 acres John Lick, deeded from Geo.

B. Thaggard to the Jefferson Lumber Company, April 2nd, 1890, recorded in Clerk's office, Cass County, Texas, in deed record M, page 271.

Also 600 acres Wm. Donahue survey, deeded from W. P. Cerrelins et al, to the Jefferson Lumber Company, March 23rd, 1890, recorded in deed Record book H, page 538; all of said tracts of land situated in Cass County, Texas, about 8 miles west of Atlanta.

Also pine timber on the following described tracts of land situated in Cass County, Texas:

320	Acres	T. J. Foster headright	survey.
160	"	N. J. Wilson pre-emption	"
212	"	Dixon Dyer headright	"
160	"	C. Lemmons	"
100	"	Wm. Wilson	"
100	"	K. A. Wellborn	"
72	"	M. B. Frazier	"
900	"	A. D. Duncan	"
174	"	R. C. Graham	"
80	"	K. A. Welborn	"
50	"	Dixon Dyer	"
240	"	J. R. Boice	"
275	"	A.A. Taylor and H.R.Jones	"
100	"	" "	"
553 1-2	"	K. A. Wilson	"
98	"	"	"
78 1-2	"	A. D. Duncan	"
100	"	John Lick	"

The last above described eighteen tracts of land are fully described in a certain deed of trust from the Jefferson Lumber Co., to W. R. Camp, trustee, dated July 7th, 1891, recorded in County Clerk's office, Cass County, Texas, in book D of mortgages, pages 199 to 215 inclusive, which said deed is now referred to for a more perfect description of said land upon which said pine timber stands.

Also 440 acres of land situated in Harrison County, Texas, a portion of the headright survey of 440 acres of land. For a more perfect description of said 440

acres of land, a reference is hereby made to a deed from C. C. Galloway, W. L. Whitaker and Benjamin Whitaker to the Jefferson Lumber Company, dated July 8th, 1885, which deed is recorded in County Clerk office in Harrison County, Texas, in deed register No. 22, page 105, Also fractional block No. 35, in the town of Kildare, Cass County, Texas; also 10 acres situated in Marion County, Texas, a portion of the Greenleaf Perry survey. For a more perfect description, of which a reference is hereby made to a deed from E. W. Taylor to Whitaker & Galloway, dated December 30th, 1884, recorded in the County Clerk's office in Marion County, Texas, in deed register, Vol. 2, page 438 and 439.

Also 798 acres of land located in Marion County, Texas, being the Dan O. Driscol bounty warrant survey, and patented to L. A. Johnson, assignee of said Driscol, January 30th, 1873; No. patent 404, Vol. 14. For a more perfect description of said land a reference is hereby made to said patent.

Also 100 acres of land situated in Marion County, Texas, as a portion of the Greenleaf Perry H. R. survey; for a more perfect description, see deed from Whitaker & Galloway to the Jefferson Lumber Company.

Comprising all the property formerly owned by the Jefferson Lumber Company, and sold to W. B. Ward, W. B. Chew, John M. Bemis and Elijah Robinson, by O'Neal and Allday, Commissioners, except the lumber and stock of merchandise.

It is, therefore, considered, ordered and decreed by the Court, that the said lien created by said deeds of trust executed by said Jefferson Lumber Company, and said deed of trust executed by said Kildare Lumber Company, and the same are hereby each and all foreclosed, and it is ordered and decreed by the Court that the property in said deeds of trust described, be sold at the front door of the United States Post Office and Court House in the City of Jefferson, County of

Marion, and State of Texas, at public auction, to the highest and best bidder for cash; that J. S. Williams be, and he is hereby, appointed Commissioner for the purpose of selling the property, and he is hereby authorized, empowered, and directed, to sell said property as hereinbefore provided.

And it is further ordered that the said Commissioner give at least thirty days notice of said sale, by advertisement in some newspaper published in Marion County, Texas.

And it is further ordered that the purchaser at said sale, be and he is hereby required to deposit with said Commisioner on bidding off said property, a certified check of some National Bank for the sum of $5,000,-00, and that the balance of the purchase price of said property be paid by the purchaser, on confirmation of the sale by this Court. And if said purchaser should fail to make such payment within such time as may be then prescribed by order of this Court, then said sum of $5,000.00, so deposited as herein provided, or such thereof as may be ordered by this Court, shall be by him forfeited.

And it is further ordered by the Court, that said Commissioner be, and he is hereby required, to make report to this Court of his acts and doings under this order, within ten days after making said sale as herein provided for.

And it is further ordered by the Court that the purchaser or purchasers of said property, take the same free and clear of any lien or claims held or claimed by any of the parties to this suit, except the Atlanta Bank, and as to said Bank, it is ordered that said Bank be dismissed from this cause, without prejudice as to its rights, if any it has, under the aforesaid deeds of trust executed by the said Jefferson Lumber Company to W. R. Camp, it not being decided in this action whether said Atlanta Bank's claim is valid or unvalid, and without prejudice to any right of action against the complainant herein growing out of the restraining

order, or any order orther or proceedings in this cause

And it is further ordered by the Court that the proceeds of the sale of said property be applied as follows:

1st. To the payment of the cost and expenses of this suit, and the expense of the sale herein provided for.

2nd. To the payment of the said Rogers as assignee, the said sum of $11,951.36, with six per cent. interest from this date.

3rd. To the payment, ratably, to the National Bank of Commerce, of Kansas City, Missouri, and the said W. B. Ward, the amounts due them respectively, from the said Kildare Lumber Company, that is, to said bank the sum of $33,267.00 with interest thereon from date at the rate of six per cent. per annnm, and to said Ward the sum of $5,099.25, with interest thereon at the rate of six per cent. per annum from this date.

It is further ordered and decreed by the Court that the said, the National Bank of Commerce, of Kansas City, Missouri, recover of the said Kildare Lumber Company the said sum of $33,267.00, with interest thereon from this date at the rate of six per cent. per annum. And if the proceeds of the sale of said property as hereinbefore provided be not sufficient when applied as herein provided to pay said sums due, said National Bank of Commerce and said W. B. Ward, and interest thereon in full, execution be issued against said Kildare Lumber Company, and in favor of said National Bank of Commerce and said W. B. Ward, for the balance remaining unpaid.

It is further ordered, adjudged and decreed by the Court that W. R. Camp, George T. Todd, J. H. Bemis and Louis S. Schluter, defendants herein be dismissed hence without day, and that they receive their costs by them respectively incurred.

It is further ordered that J. H. Bemis' right to resist payment of the notes held by complainants against

the Jefferson Lumber Company, J. H. Bemis or J. H. Bemis & Co., is not adjudicated herein, and as to that this decree is without prejudice.

To all of which the defendants, the Kildare Lumber Company by its solicitor, C. S. Todd, Esq., excepts in open court and prays that it be allowed an appeal to the Circuit Court of Appeals or the Supreme Court of the United States as it may elect, which is allowed and granted by the Court.

DAVID E. BRYANT.
Judge.

Filed October 3rd, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court of the Eastern District of Texas, at Jefferson.

The National Bank of Commerce, of Kansas City, Mo.	Plantiff
vs.	Chy. No. 38.
The Kildare Lumber Co., et al.	Defendants.

Now comes the defendant, the Kildare Lumber Company, and suggests to the court that the judgment cannot legally or equitably be entered in this cause; and that this court hath no jurisdiction of this cause, because.

1st. The trustee, Lewis S. Schluter, is a citizen of Texas and is properly a party plaintiff.

2nd. Defendant W. B. Ward, is a resident and citizen of Texas, and is one of the beneficiaries of the mortgage or trust deed sought to be foreclosed herein, and is properly, by interest, a party plaintiff and the defendant Kildare Lumber Company, is a citizen of Texas, all of which appears from the allegations of plaintiff's bill herein and from the record.

Wherefore defendant moves and prays the court to

arrest its judgment and decree herein and dismiss this cause for want of jurisdiction.

CHAS. S. TODD,
Solicitor for defendant, Kildare Lumber Company.

Endorsed U. S. Chy. No. 38. The National Bank of Commerce, of Kansas City, Mo., vs. The Kildare Lumber Company et al.
Motion to arrest decree and dismiss cause.
Filed October 3rd, 1894. C. Dart, Clerk.

WEDNESDAY, OCTOBER 3RD, 1894.

National Bank of Commerce, of Kansas City, Mo., vs. Kildare Lumber Company et al. } Eq. 38

On this day came the defendant, the Kildare Lumber Company, by its solicitor, Chas. S. Todd, and thereupon came on to be heard the motion of the said defendant to arrest the decree and dismiss the cause. And the said motion being considered by the Court is overruled; to which ruling the said defendant then and there in open court excepted.

In the U. S. Circuit Court, Eastern District of Texas, at Jefferson.

The National Bank of Commerce of Kansas City, Mo., vs. Kildare Lumber Company, et al

To the Hon. D. E. Bryant. U. S. District Judge for said District, sitting as Circuit Judge:

The Kildare Lumber Company, defendant in the above entitled cause respectfully states to your Honor that it desires to appeal from the decree rendered by you in this cause to the United States Circuit Court of Appeals at New Orleans, and desires to supercede the execution of said decree, but it is unable to give a

supercedeas bond in the full amount of the judgment rendered; but defendant says that the property upon which the mortgage is foreclosed in the decree is of value far more than sufficient to pay said judgment and costs, as shown by affidavits hereto attached and referred to as Exhibits hereto, and defendant says that it can give and here tenders a bond with good and sufficient security for ($20.000.00) twenty thousand dollars, which defendant respectfully states would be ample to respond to all damages and costs occasioned by the appeal in case said judgment and decree should be affirmed.

Wherefore said defendant prays that its appeal be allowed and that a transcript of the record may be sent to said Circuit Court of Appeals and that supercedeas issue upon the approval by your Honor of the bond for $20,000.00, presented by defendant; for citation, and all proper process and orders, and defendant shall ever pray etc.

TODD & RODGERS,
Solicitors for Defendant.

In Chambers, Paris, November 20th, A. D. 1894.

Upon consideration of this petition for appeal, the appeal is allowed to operate as a supercedeas upon the respondent, the Kildare Lumber Company, giving a bond in the sum of thirty thousand dollars, with two or more good sureties and to be conditioned and payable as required by law.'

DAVID E. BRYANT,
Judge.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company, et al.

Application to fix amount of appeal bond and prayer for appeal. Filed December 10th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

In the United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, La.

The Kildare Lumber Company, vs. The National Bank of Commerce of Kansas City, Mo. The Atlanta Bank of Atlanta, Texas, T. J. Rogers, Assignee of the Citizens Bank of Jefferson, Texas, W. R. Camp, Geo. T. Todd, J. H. Bemis W. B. Ward and Lewis S. Schluter.	Appellant. Appellees.

Appeal from the United States Circuit Court, Eastern District of Texas, at Jefferson.

ASSIGNMENT OF ERRORS.

The Appellant, the Kildare Lumber Company, respectfully assigns and submits the following as error committed by the Court below in this cause:

I. The Court erred in overruling the appellant's demurrer and plea to the jurisdiction of the Court and motion in arrest of judgment, because it appeared from the original bill and from the evidence uncontroverted, that the defendants, the Kildare Lumber Company, W. B. Ward and Lewis S. Schluter were, and are citizens of the same State and District, to wit: The State and Eastern District of Texas, and the plaintiff, a citizen of Missouri, and that the said W. B. Ward and Lewis S. Schluter, trustee, were real plaintiffs in interest and should be considered as such; wherefore it appears that the controversy was not, and is not, wholly between citizens of different States.

II. The Court erred in rendering a decree in favor of defendant, T. J. Rogers, assignee of the Citizens Bank of Jefferson, Texas, upon his cross bill for foreclosure of the deed in trust from the Jefferson Lumber Company to W. R. Camp as trustee, because,

1st. The Court had no jurisdiction of the original bill, nor of the cross bill for the reasons stated above.

2nd. The undisputed evidence shows that said trust

deed to W. R. Camp, trustee was made by an insolvent corporation; sought to prefer creditors, and was, therefore, void as to the creditors and as to appellant.

3rd. The undisputed evidence shows that the claim of indebtedness alleged to be due by the Jefferson Lumber Company to the Citizens Bank and attempted to be secured by said trust deed to W. R. Camp, trustee, was barred by the Statutes of limitation of Texas, which was duly pleaded by appellant and defendant, the Jefferson Lumber Company.

4th. No personal judgment is prayed in said cross bill, nor rendered in the decree against the Jefferson Lumber Company.

III. The Court erred in rendering decree of foreclosure in favor of defendant W. B. Ward for $5,099.25 because:

1st. The Court had no jurisdiction to render such decree in this cause.

2nd. There was no cross bill or other pleadings by said W. B. Ward upon which to base such decree.

IV. The decree of the Court is not supported by and is against the evidence because the evidence shows that plaintiff has failed, and refused to surrender the evidences of indebtedness held by it against the Jefferson Lumber Company and J. H. Bemis & Co., which surrender was the sole consideration for the notes sued on, and was a condition precedent, the performance which, by plaintiff was essential before any cause of action accrued on the notes sued on by plaintiff in this cause.

V. The Court erred in dismissing, without prejudice as to the defendant, The Atlanta Bank of Atlanta, Texas, and not rendering its final decree against said Atlanta Bank, and adjudging that it take nothing and pay its cost; because the pleadings of said defendant, Atlanta Bank, and the evidence put in issue all its rights and equities, if any it had, and required the judgment of the Court upon the merits thereof, if any, and appellant was entitled to a final judgment in its

favor as against said Atlanta Bank. Of all of which the appellant prays the judgment of the Hon. United States Circuit Court of Appeals.

CHAS. S. TODD,
Solicitor for appellant, Kildare Lumber Company.

Endorsed, U. S. Chy. No. 38. The National Bank of Commerce of Kansas City, Mo., vs. the Kildare Lumber Company, et al. U. S. Circuit Court Eastern District of Texas, at Jefferson. Assignment of Errors on Appeal. Filed December 10th, 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

THE UNITED STATES OF AMERICA, SS.

THE PRESIDENT OF THE UNITED STATES:

To the National Bank of Commerce, of Kansas City Missouri; T. J. Rogers, assignee of the Citizens Bank of Jefferson, Texas: The Atlanta Bank, of Atlanta, Texas; W. R. Camp, Geo. T. Todd, J. H. Bemis, W. B. Ward and Louis S. Schluter, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's Office, of the United States Circuit Court of the Eastern District of Texas, at Jefferson, Texas, wherein the Kildare Lumber Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Melville, W. Fuller, Chief Justice of the Supreme Court of the United States this 11th day December, in the year of our

Lord one thousand eight hundred and ninety-four.

DAVID E. BRYANT,

Attest: U. S. District Judge E. D. Texas.

C. DART, Clerk,

By H. H. KIRKPATRICK, Deputy.

On this 19th day of December in the year of our Lord one thousand eight hundred and ninety-four, personally appeared George B. Adams before me, the subscriber a Deputy United States Marshal in and for the Eastern District of Texas and makes oath that he delivered a true copy of the within citation to National Bank of Commerce of Kansas City, Missouri, by serving J. H. Culberson, its attorney of record, in person; the Atlanta Bank, of Atlanta, Texas by serving its attorney of record L. S. Schluter in person; T. J. Rogers in person, assignee of the Citizens Bank of Jefferson, Texas; W. R. Camp, by his attorney of record, F. H. Prendergast, in person; Geo. T. Todd, in person, W. B. Ward, in person; J. H. Bemis, in person, and L. S. Schluter, in person; each at Jefferson, Texas, except J. H. Bemis who was served in Texarkana, Texas.

G. B. ADAMS,

Sworn to and subscribed the above return before me this the 19th day of December, A. D., 1894.

C. DART, Clerk,

By W. E. SINGLETON, Deputy.

Endorsed: No. 38, Chancery Docket, United States Circuit Court, Eastern District of Texas, at Jefferson, Texas.. The National Bank of Commerce, of Kansas City, Mo., vs. the Kildare Lumber Company et als. Citation on appeal. Issued Dec. 12, 1894 C. Dart, Clerk, by W. E. Singleton, Deputy.

KNOW ALL MEN BY THESE PRESENTS, That we, Kildare Lumber Company, a private corporation—appellant, as principal, and.....as sureties, are held and firmly bound unto the National Bank of Com-

merce of Kansas City, Mo., the Atlanta Bank of Atlanta, Texas, T. J. Rogers, assignee of the Citizens Bank of Jefferson, Texas, W. R. Camp, Geo. T. Todd J. H. Bemis, W. B. Ward and Louis S. Schluter, appellees in the full and just sum of two thousand ($2,000.00) dollars, to be paid to the said parties last above named as appellees, their certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 10th day of December, in the year of our Lord one thousand eight hundred and ninety four,

WHEREAS, lately, at a Circuit Court of the United States for the Eastern District of Texas at Jefferson, in a suit depending in said Court, between the National Bank of Commerce of Kansas City, Mo. plaintiff and the Kildare Lumber Company, the Atlanta Bank of Atlanta, Texas, T. J. Rogers, assignee of the Citizens Bank of Jefferson, Texas, W. R. Camp, Geo. T. Todd, J. H. Bemis, W. B. Ward and Louis S. Schluter, a decree was rendered rgainst the said Kildare Lumber Company and the said Kildare Lumber Company having obtained appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit. and a citation directed to the said The National Bank of Commerce, of Kansas City, Mo., the Atlanta, Bank, of Atlanta, Texas, T. J. Rogers, assignee of the Citzens Bank, of Jefferson, Texas, W. R. Camp, Geo. T. Todd, J. H. Bemis, W. B. Ward, and L. S. Schluter citing and admonishing them and each of them to be and appear before the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such that if the said Kildare Lumber Company shall prosecute its appeal to effect, and answer all costs if it fail to make its plea good, then the above obligation

to be void; else to remain in full force and virtue.

KILDARE LUMBER COMPANY,
By W. B. WARD, Prest.

Sealed and W. B. WARD. [SEAL] surety.
delivered in E. JONES. [SEAL] surety.
presence of: By W. B. WARD, his attorney in fact.
J. M. BEMIS, [SEAL] surety.
By W. B. WARD, his attorney in fact.

APPROVED BY:
DAVID E. BRYANT,
Judge Presiding of said Court.

OATH TO BE TAKEN BY SURETY.

I, W. B. Ward, do solemnly swear that I am worth in my own right, at least the sum of two thousand ($2,000.00) dollars, after deducting from my property all that which is exempt by the Constitution and Laws of the State from forced sale, and after the payment of all my debts of every description, whether individual of security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Marion County, State of Texas, and have property in said State liable to execution worth two thousand ($2,000.00 dollars or more.)

W. B. WARD, Surety.

Sworn to and subscribed before me on this the 10th day of December, A. D., 1894.

[SEAL] Witness my hand and official seal.

W. E. SINNLETON,
Commissioner U. S. Circuit Court,
Eastern District of Texas.

OATH TO BE TAKEN BY SURETY.

I, W. B. Ward, do swear that I am attorney in fact for J. M. Bemis and E. Jones, and that within my knowledge they each are worth in their own right at least the sum of two thousand ($2,000.00) dollars after deducting from their property all that which is exempt by the Constitution and Laws of the State from forced sale, and after the payment of all their debts of

every description, whether individual or security debts, and after satisfying all incumbrances on their property which are known to me: that they reside, J. M. Bemis in Pennsylvania and E. Jones in Massachusetts, and have each property in the state of Texas, liable to execution, worth two thousand dollars or more.

W. B. WARD.

Attorneys in fact for said sureties.

Sworn to and subscribed before me on this the 10th, day of December, A. D. 1894.

[SEAL] As witness my hand and official seal.

W. E. SINGLETON,
Commissioner U. S. Circuit Court,
Eastern District of Texas.

Endorsed: No. 38, Chy. Docket. United States Circuit Court, Eastern District of Texas, at Jefferson, The National Bank of Commerce of Kansas City, Mo. vs. the Kildare Lumber Company, et al. Bond for costs on appeal. Filed this the twelfth day of December A. D. 1894. C. Dart, Clerk, by W. E. Singleton, Deputy.

The National Bank of Commence of Kansas City, Mo., vs. The Kildare Lumber, et al. } Chy. No. 38.

COST BILL.

1894.			
Decr. 12.	To Fil. Cert	$	10
	" Issue Citation	1	30
	" Fil & Enter return Citation		40
	" Approving Bond	1	50
	" Fil. Bond		10
	" Recording Bond, 7 fols	1	05
	" Filing 3 sureties on bond		30
	" 3 Certificates and Seal	1	50
	" Making 9 copies of Citation	9	00
	" 9 Certificates to citation	4	50
Dec. 15.	" Issuing precept to serve	1	00

" Fil and Enter	40	$21 15
" Certificate and Seal	50	
" Transcript, 380 pp	160 00	160 50
		$181 65

O. K.

CHAS. S. TODD,
Att'y for Appellant,
Kildare Lbr. Co.

Reived payment January 5th, 1895.

C. DART, Clerk,
By W. E. Singleton, Deputy.

Jefferson, Texas, Dec. 17th, 1894.

Received of W. B. Ward, Erastus Jones and J. M. Bemis, Twenty and no-one-hundredths dollars for costs in case of National Bank of Commerce of Kansas City, Mo., vs. Kildare Lbr. Company.

G. B. ADAMS,
Deputy U. S. Marshal.

Received of Chas. S. Todd, Solicitor for Kildare Lumber Company, two hundred and nine and 70-100 dollars in full, for printing Record for Appeal in case of Kildare Lumber Company, Appellant, vs. The National Bank of Commerce of Kansas City, Mo., et al., Appellees. 283 pages.

This January 14th, 1894.

A. C. STUART PRINTING CO.,
Texarkana, Texas.

Chancery No. 38.

In the Circuit Court of the United States, for the Eastern District of Texas, at Jefferson.

I, C. Dart, Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached pages of numbered in the margin of said pages (from one (1) to (279) both inclusive) contains a

full, true and correct copy and transcript of the original pleadings, evidence, orders, judgment, decree and proceedings (except papers and proceedings relating exclusively to the Receivership, which are omitted by stipulation of the parties, in writing, and filed herein,) filed and had in cause Chancery No. 38. The National Bank of Commerce of Kansas City, Mo., vs. The Kildare Lumber Company and others, all of which appears from the records of said Court, now in office.

SEAL U. S. CIRCUIT COURT.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, for the Eastern District of Texas, at Jefferson, at my office in said City of Jefferson, this 14th day of January, A. D., 1895.

C. DART,
Clerk of U. S. Circuit Court, Eastern District of Texas, at Jefferson.

By W. E. SINGLETON, Deputy.

FILED
OCT 19 1895
JAMES H. MCKENNEY,
CLERK.

NO. 780

THE LAW ASSOCIATION
OF
PHILADELPHIA.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE KILDARE LUMBER COMPANY, Appellant,

vs.

THE NATIONAL BANK OF COMMERCE, OF KANSAS CITY, MO., ET AL., } Appellees.

BRIEF AND ARGUMENT FOR CERTIORARI.

BRIEF AND ARGUMENT IN SUPPORT OF APPLICATION FOR CERTIORARI.

I.

The defendant, L. S. Schluter, trustee in the trust-deed sought to be foreclosed, being a citizen of the same State with the defendant Kildare Lumber Company, against whom the relief is sought, the United States Circuit Court for the Eastern District of Texas was without jurisdiction.

The Statute law of Texas provides as follows: "The "common law of England, (so far as it is not inconsistent "with the constitution and laws of this State), shall, to- "gether with such constitution and laws, be the rule of de- "cision, and shall continue in force until altered or rpealed "by the legislature."

Act of Jan. 20, 1840, 2 Sayles' Tex. Civ. Stat. Art. 3128.

No statute has ever been passed in Texas affecting the question of the legal title in mortgages and deeds in trust conveying real property.

The Supreme Court of Texas has held as a proposition of general law, that mortgages and deeds in trust in the nature of mortgages are securities only, and do not pass the absolute legal title, and a trustee is not an indispensable, though a proper party, to a foreclosure suit.

Shelby vs. Burtis, 18 Tex. 377.
McLane vs. Paschal, 47 Tex. 369.

As a question of general law the Courts of the United States have uniformly held that the trustee in a deed of trust takes the legal title to the trust estate, and is a necessary, and not merely a formal, party to a bill for fore-

closure, in order to divest him of such legal title and terminate the trust.

Coal Co. vs. Blatchford, 11 Wall, 172.
Knapp vs. R. R. Co., 20 Wall, 117.
Gardner vs. Brown, 21 Wall, 36.
Thayer vs. Ass'n, 112 U. S., 717.
Peper vs. Fordyce, 119 U., S. 469.
Shipp vs. Williams, 10 C. C. A. 389; 62 Fed. Rep. 4.
Rust vs. Brittle Silver Co., 7 C. C. A. 389; 58 Fed. Rep. 611.
Story Eq. Pl. §§ 207, 541.
2 Perry on Trusts, §§ 873, 875, 887 et seq.
Harter vs. Twohig, U. S. Sup. Ct. May 27, 1895.

In such a suit the citizenship of the trustee is material in determining jurisdiction, and he should be aligned with the beneficiary plaintiff in arrangement of parties without reference to the pleadings, but with reference to the respective interests to the parties.

Removal Cases, 100 U. S. 457.
R. R. Co. vs. Ketchum, 101 U. S. 289.
Shipp vs. Williams. 10 C. C. A. 247.

The case of *Shipp vs. Williams, supra,* by the U. S. Circuit Court of Appeals for the Sixth Circuit, is precisely analagous in all respects with the present case, and is a sound and well considered opinion, amply supported by authorities. In that case the Court says (Lurton, Circuit Judge,):

"A trustee under a mortgage or deed of trust is made "so by the act of the parties. His duties are active. The "legal title vested in him cannot be divested, so that a fee "may be passed to the purchaser, unless he be a party to "the cause. The cases we have cited above absolutely es- "tablish the proposition that such a trustee, instead of "being a formal or nominal party, is a necessary party "where the beneficiary seeks a decree of foreclosure.

"The duty of arranging parties according to their inter-
"ests applies as well in cases of original jurisdiction under
"the first section of the Act of March 3, 1875, as it does
"under the removal section of the same Act. (Railroad
"Co. vs. Ketchum, 101 U. S. 289: Pittsburg, C. & S. L.
"Ry. Co. vs. Baltimore & O. R. Co., cited above.) Ar-
"ranging the parties to this suit according to their interests
"operates to place Woodworth and Wheeler (the
"trustees,) on the same side of the case occupied by the
"complainants. We then have a case where some of the
"complainants are citizens of the same State as the defend-
"ants. Jurisdiction is thereby defeated."

In *Rust vs. Silver Co., supra,* Caldwell, Circuit Judge, says: "The bill avers that Frost, the trustee, is only a "nominal party and the jurisdiction of the Court is at-
"tempted to be supported upon that theory, but the posi-
"tion is not tenable. The deed of trust *invested Frost with "the legal title to the premises,* and imposed on him the duty
"of selling the property and applying the proceeds to the
"payment of certain debts of the grantor."

In the very recent case of *Harter vs. Twohig,* decided by the U. S. Supreme Court on May 27, 1895, which was a case arising in Nebraska, where it was provided by Statute that "the mortgagor of real estate retains the legal "title and right of possession thereof," Mr. Chief Justice Fuller says:

"In respect of the nature of a conveyance in mortgage
"at common law, the legal title vested in the mortgagee and
"was forfeited upon default, but equity established the right
"of redemption after default. And, variously modified,
"where the common law doctrine prevails, a mortgage is

"still regarded as a conveyance in fee, although a convey-
"ance as a security, while in many of the States this has been
"changed, chiefly by statute, so that a mortgage is regarded
"merely as a pledge. The common law, so far as applicable,
"and not inconsistent with the Constitution of the United
"States or the organic law of the territory, or with any law
"of the terrtorial legislature, was adopted and declared to
"be law within the territory of Nebraska by Act of March
"16, 1855 (Laws Neb. 1855, 328) but by section 30 of an
"Act approved February 21, 1855(Ib. 166)it was provided
"that 'in the absence of stipulations to the contrary, the
"mortgagor of real estate retains the legal title and right of
"possession thereof.' Thus, irrespective of the terms of
"the instrument in particular cases,instead of the mortgagee
"being entitled to immediate possession of the mortgaged
"property as an incident of the title, the mortgagor was en-
"titled to possession until foreclosure. The conveyance in
"this case was, however, a trust deed and not a mortgage,
"and by section 676 of the law of territory, also approved
"March 16, 1855,(Laws Neb., 1855),55, 119, it was provi-
"ded: 'Deeds of trust of real or personal property may be
"executed as securities for the performance of contracts, and
"sales made in accordance with their terms are valid. Or
"they may be treated like mortgages and foreclosed by
"action in the district court.' This recognized *the distinct-*
"*ion between a trust deed and a mortgage,* and while provid-
"ing that a trust deed might be treated like a mortgage and
"foreclosed as mortgages might be,*did not undertake to deal*
"with the legal title which passed by the conveyance to the trustee
"The section was in terms adopted from the Code of Iowa of
"1851 (Code Iowa, 1851, chap. 118, § 2096; Laws Neb.,

"1855, p. 55) which code likewise contained the provisions "as to the retention of the legal title by the mortgagor above "quoted from the laws of Nebraska of February 21, 1855, "(Code Iowa, 1851, § 1210,) and it has been repeatedly "held by the Supreme Court of Iowa that the legal title "vests in the trustee under such a deed.

Devin v. Hendershott, 32 Iowa, 192, 194;
Newmanv. De Lorimer, 19 " 244;
Tucker v. Silver, 9 " 281;
Cook v. Dillon, 9 " 407, 74 Am. Dec 354.

"It is true that in *Webb v. Hoselton*, 4 Neb,,308, 19 Am. Rep. 638, "decided at January term, 1876, the Supreme Court of "Nebraska held that a conveyance in the form of a deed of "trust to secure the payment of a promissory note condi- "tioned that in case of failure to pay, the trustee shall sell, "or. upon payment, reconvey, is in effect only a mortgage. "Of course, in many particulars, the attributes of deeds of "trust and mortgages with a power of sale are the same. "Both are intended as securities; in both, *if not controlled by* "*statute*, the legal title passes from the grantor, but in Equity "he is, before foreclosure, considered the actual owner; and "in both the grantor has the right to redeem. But the case "did not involve the application of the territorial Act to which "we have referred, and changes had taken place in legisla- "tion during the intervening period.

"The land in question was unoccupied and wild land. "and their being no adverse holding, upon breach of condi- "tion, if not before, *the legal title which Kountze held drew to* "*it the possession*, although in subjection to the right of re- "demption in Wilbur and his grantees. * * * *

"Even if in the case in hand the possession may be "regarded as constructive merely, *yet as the legal title was in* "*the trustee and not in Wilbur* and only a bare right to redeem

"could be transferred to and by Wilbur's grantees, we "hold that the same principle by analogy applied to them "and to Twohig, which could only be overcome, if at all, by "superior equities on his part."

In the case of *Webb vs. Hoselton,* referred to by Chief Justice Fuller, the Supreme Court of Nebraska says: "The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor *does it convey the legal title;*" which is the same doctrine announced by the Texas Court. Yet this Court declines to follow that decision in *Harter v. Twohig,* because *the statute* "did not undertake to deal with the conveyance to the trustee," and commenting on *Webb vs. Hoselton,* says "Both" (that is, mortgages and trust deeds) "are intended as securities; in both, *if not controlled by statute,* the *legal title passes from the grantor." &c.*

Whether or not the trustee takes the legal title or an interest in the land, determines whether or not he is a necessary party to a foreclosure suit; and whether he is a proper and necessary or only a nominal and formal party determines the jurisdiction of the U. S. Court. These, in the absence of a State statute "dealing with the legal title," are questions of general law, and have uniformly been decided by the U. S. Courts upon their own construction of the common law without reference to State decisions. It believed no case can be found wherein any Court of the United States has held such a trustee to be merely a formal or nominal party; and certainly no case, other than this, in which, in the absence of a State statute, the *jurisdiction, in Equity,* of the Courts of the United

States has been held to depend on or be affected by the decisions of State Courts. On the contrary it has uniformly been held by this Court that the Equity jurisdiction of Courts of the United States must be uniform in all the States and determined only by the Courts of the United States, under the Constitution and laws of the United States.

Neves vs. Scott, 13 How. 268.
Montejo vs. Owens, 14 Blatch, 326.
Robinson vs. Campbell, 3 Wheat, 212.
Wheeling Bridge Case, 13 How. 521.
U. S. vs. Howland, 4 Wheat, 115.
Boyle vs. Zachry, 6 Peters, 658.
Livingston vs. Story, Peters, 654.
Payne vs. Hook, 7 Wall. 425.
Dodge vs. Woolsey, 19 How. 331,
Scott vs. Neely, 140 U. S. 106.
Cates vs Allen, 149 U. S. 451.
Hollins vs. Brierfield Co., 150 U. S. 379.
U. S vs. Bell Tel. Co., 29 Fed. Rep. 17.
Murray vs. R. R. Co., 62 Fed. Rep. 24.

It is necessary that an uniform rule as to the principles of Equity and the jurisdiction of Courts of the United States should prevail, entirely independent of the rule of decision in any State; otherwise a Court of the United States might entertain a suit in Equity in Texas or California, when the same case would not be cognizable in a Court of the United States in Tennessee or Masschusetts. In *Neves vs. Scott,* [13 How. 272] the Supreme Court of the United States uses the following clear and unmistakable language:

"Wherever a case in equity may arise and be deter-
"mined under the Judicial power of the United States, the
"same principles of equity must be applied to it; and it is

"for the Courts of the United States, and for this Court in "the last resort, to decide what those principles are, and to "apply such of them to each particular case as they may "find justly applicable thereto. These principles may "make part of the law of the State, or they may have "been modified by its legislation, or usages, or they may "never have existed in its jurisprudence. Instances of "each kind may now be found in the several States. But in "all the States, the equity law, recognized by the Consti- "tution and by Acts of Congress, and modified by the lat- "ter, is administered by the Courts of the United States, "and upon an appeal by this Court.

"Such has long been the settled doctrine of this Court, "repeatedly and steadily affirmed in whatever form the "question has been presented. In the *United States vs. "Howland, 4 Wheat, 115,* Chief Justice Marshall said: 'As "the Courts of the Union have chancery jurisdiction in "every State, and the Judiciary Act confers the same "chancery power on all, and gives the same rule of decis- "ion, its jurisdiction in Massachusetts must be the same "as in other States.' So Mr. Justice Story, in *Boyle vs. "Zacharie, et. al., 6 Pet.. 658,* says: 'The chancery juris- "diction given by the Constitution and laws of the United "States is the same in all the States of the Union and the "rules of decision are the same in all. See, also, *Robinson "vs. Campbell 3 Wheat, 222: Livingston vs. Story, 9 Pet., 654; "Russell vs. Southerland.* decided at the present term, and "reported in 12 Howard, 138.' "

It may be conceded that the U. S. Courts will ordinarily follow the State rule of decision when not in conflict with the laws of the United States, and as against a differ-

ent rule obtaining in another State, when the point is *before the court for decision*, and the *jurisdiction of the U. S. Court is conceded and unquestioned;* but it is believed that in no case has a State rule of decision been made, as in this case, *the basis of determining the jurisdiction of the United States Court in Equity cases*. If this were so, inextricable confusion might and probably would follow, and the U. S. Courts would take jurisdiction in one State of a case in Equity, when under *precisely the same facts and conditions* they could not do so in another State; thus destroying the uniformity of jurisdiction, and making it dependent upon the conflicting adjudications of questions of general law by the various State Courts. If it be conceded that the Supreme Court of Texas holds, as a general proposition of law, in the absence of any statute, that trustees and mortgagees do not take the legal title, still it is submitted and insisted that such decision *is in conflict with the decisions of the Courts of the United States*, and such erroneous rule of decision should not control in cases where the important question of the Equity jurisdiction of U. S. Courts is dependent upon it. In Texas the common law prevails in the absence of statute; in Tennessee it is the same; yet the U. S. Court in Texas takes jurisdiction of a case in Equity *precisely analagous as to jurisdictional facts* to the case of *Shipp vs. Williams*, in which the U. S. Circuit Court of Appeals of the Sixth Circuit held that the U. S. Circuit Court had no jurisdiction in Tennessee. This condition is anomalous, and seems to us to be wholly at variance with the theory and practice of chancery jurisdiction in the Courts of the United States.

II.

This suit having been brought for the benefit of W. B. Ward, one of the defendants, co-incumbrancer with plaintiff, as well as for the benefit of plaintiff, the fact that said Ward was and is a citizen of the same State with the Kildare Lumber Company against whom the substantial relief is sought, defeats the jurisdiction of the United States Circuit Court.

In this suit Ward is made a defendant as the holder of some of the same series of notes as those sued on by plaintiff and secured *in solido* by the same deed in trust to Schluter. The bill prays as follows:

"And your orator prays that it may have judgment "against said Kildare Lumber Company for the amount of "said notes herein above described, executed by said Kil-"dare Lumber Company to your orator, with interest there-"on; *that the amount, if anything, due on said notes executed "by said Kildare Lumber Company to said W. B. Ward, be "ascertained,* * * * * that the equity of redemption "of said Kildare Lumber Company in and to the said "property conveyed by it to said Schluter in trust as "hereinbefore stated, be foreclosed and said property sold "for the payment of the amount due on *the indebtedness by "said deed of trust secured.*" (Record pp 17-18). Ward appeared and set up his notes and prayed foreclosure, joining in plaintiff's prayer, (Record pp 46-47), and final decree was rendered in his favor for $5,099.25 (Record 267).

In *Blacklock vs. Small, 127 U. S. 96-105*, the suit for foreclosure was brought in the U. S. Circuit Court for the District of South Carolina, by Emma Jane and Mary

Blacklock, citizens of Georgia, against Jacob Small and Helen Robertson Blacklock, citizens of South Carolina, and Alexander Robertson, citizen of North Carolina. The plaintiffs and the defendant Helen Robertson Blacklock were jointly interested in the bond and mortgage sought to be forclosed.

In that case the Court says (p. 105):

"The relief asked in the suit must necessarily be for "the benefit of the defendant, Helen Robertson Blacklock, "as well as for the benefit of the plaintiffs, especially as by "her answer, she ranged herself on the side of the plaintiffs "as against Small, joins in the prayer of the bill, and asks "that the payment of the bond and the satisfaction of the "mortgage be declared void, and that the bond and mort-"gage be declared valid in the hands of Robertson, as "trustee for the benefit of herself and plaintiffs, and that "Small be decreed to pay to herself and the plaintiffs the "amount of money secured by the bond and mortgage, "with interest. The suit is therefore shown to be one sub-"stantially by and for the benefit of Helen Robertson "Blacklock, and the proof shows that, at the time of the "commencement of the suit, she was, and has since then "always continued to be, a citizen of South Carolina, of "which State Small was and is a citizen. The Circuit "Court ought therefore to have dismissed the bill for want "of jurisdiction, and not upon the merits;" *citing:*

Ayers vs. Wiswall, 112 U. S. 178.
Thayer vs. Life Ass'n, 112 U. S. 717.
R R. Co. vs. Mills, 113 U. S. 249.
R. R. Co., vs. Ide 114 U. S. 52.

The record fails to disclose any controversy whatever between the plaintiff and Ward.

It is respectfully submitted that the question presented in this application for Certiorari is one of "gravity and importance," involving the jurisdiction of the Circuit Courts of the United States, and the "uniformity of decision" of the Courts of the United States, and suggests and requires that the questions here presented should be definitely and distinctly settled by the Supreme court of the United States, the highest tribunal in the land.

M L Crawford

Solicitor for Petitioner, Kildare Lumber Co.

W. S. Todd

W. Rodgers

Counsel

Office Supreme Court, U. S.
FILED
OCT 19 1895
JAMES H. McKENNEY,
CLERK

NO. 780

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE KILDARE LUMBER COMPANY, Appellant,

vs.

THE NATIONAL BANK OF COMMERCE, OF KANSAS CITY, MO., ET AL, } Appellees.

PETITION FOR CERTIORARI.

NO. .....

In the United States Circuit Court of Appeals.

Fifth Circuit.

THE KILDARE LUMBER COMPANY, Appellant,

vs.

THE NATIONAL BANK OF COMMERCE, OF KANSAS CITY, MO., ET AL, } Appellees.

PETITION OF APPELLANT FOR CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Kildare Lumber Company, a private corporation created, organized and existing under and by virtue of the laws of the State of Texas, and a citizen of the State of Texas, and of the Eastern District of Texas, humbly complaining, respectfully states and shows unto your Honors as follows:

On the 26th day of August A. D. 1893, the National Bank of Commerce of Kansas City, Mo., a citizen of the State of Missouri, as complainant, filed its bill in Equity in the U. S. Circuit Court, for the Eastern District of Texas, at Jefferson, against your petitioner, the Kildare Lumber Company, and the Citizens Bank of Jefferson, Texas; the Atlanta Bank, of Atlanta, Texas; W. B. Ward, W. R. Camp, Geo. T. Todd, J. H. Bemis and Lewis S. Schluter, as trustee, declaring on three promissory notes of the Kildare Lumber Company, aggregating about $30,000.00, and seeking foreclosure of a deed of trust executed and delivered by the Kildare Lumber Company to Lewis S. Schluter as trustee, conveying certain mill property and about 20,000 acres of timber lands principally in Cass County, Texas, therein described, of large value to-wit: about $250,000.00, to said Schluter in trust, to secure the payment of said notes, together with others held by defendant W. B. Ward, and authorizing said Schluter, as trustee, to seize and sell said property in default of payment of said notes, and apply the proceeds of such sale to the payment thereof. W. B. Ward was joined as a defendant as the holder of some of the notes secured by the trust deed to Schluter which plaintiff sought to foreclose, and foreclosure was prayed for his benefit as well as for plaintiff. The bill alleges that plaintiff was a citizen of Missouri and that all the defendants were citizens of Texas, including the trustee, Schluter, and the co-incumbrancer, Ward, (Record pp 1-19), and the evidence so shows.

The Kildare Lumber Company appeared and answered, pleading a failure of consideration of the notes declared on by plaintiff, alleging in substance that said notes were exe-

cuted solely upon consideration of the satisfaction of, and agreement by plaintiff to surrender certain notes, acceptances and evidences of indebtedness to the amount of over $68,000.00, held by the National Bank of Commerce against the Jefferson Lumber Company and J. H. Bemis & Co., which the plaintiff still held and refused to surrender in accordance with the agreement and consideration upon which the notes sued on were executed. (Record pp. 39-44.) W. B. Ward answered, setting up the notes held by him and secured by the deed in trust to Schluter, and joining in the plaintiff's prayer for foreclosure. (Record, pp. 46-47.)

Afterwards, on Sep. 24th, 1894, the Kildare Lumber Company, upon leave obtained and notice given, amended its pleadings and filed a demurer and also a plea to the jurisdiction of the Court upon the following grounds, viz: Because the allegations of the bill and the evidence showed that Lewis S. Schluter, the trustee, and the defendant Kildare Lumber Company were citizens of the same state, to-wit: the State of Texas; that Schluter was really a proper party plaintiff, and should be aligned as such, and therefore the controversy was not "wholly between citizens of different states." (Record, pp. 1, 2, 78-80.)

This demurrer and plea were by the Court overruled, to which the defendant, Kildare Lumber Company, excepted. (Record, pp. 80-81.) The cause then came on for final hearing and the Court rendered its final decree herein, foreclosing the deed in trust in favor of plaintiff, the National Bank of Commerce, for $33,267.25, and in favor of defendant W. B. Ward for $5,099.25, with personal judgment against the Kildare Lumber Company.

After this decree the Kildare Lumber Company filed a motion in arrest of judgment on the ground that W. B. Ward, who was a real plaintiff and co-incumbrancer with the National Bank of Commerce, was a citizen of the same State as the defendant, Kildare Lumber Company, and the Court therefore had no jurisdiction to render the decree. (Record, pp. 263-269.) This motion was overruled by the Court and the defendant Kildare Lumber Company excepted, and obtained and prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans.

On appeal your petitioner, appellant, assigned the following among others, as error committed by the Court below:

"1. The Court erred in overruling appellant's demurrer and plea to the jurisdiction of the Court and motion in arrest of judgment because it appeared from the original bill and from the evidence uncontroverted, that the defendants, the Kildare Lumber Company, W. B. Ward and Lewis S. Schluter, were and are citizens of the same state and district to-wit: the State and Eastern District of Texas, and the plaintiff a citizen of Missouri, and that the said W. B. Ward and Lewis S. Schluter, trustee, were real plaintiffs in interest and should be considered as such; wherefore it appeared that the controversy was not and is not 'wholly between citizens of different States.'" And this assignment of error was presented and urged by appellant in its brief.

On the 29th day of April, A. D. 1895, said case on appeal was argued orally and submitted on brief and argument to the said Circuit Court of Appeals at New Orleans;

and thereafter, to-wit: on the 7th day of May, A. D. 1895, the decree of the Circuit Court of the Eastern District of Texas was affirmed by the said Circuit Court of Appeals, without any written opinion upon the issues involved; within twenty days after said affirmance of said decree and during the term of said Circuit Court of Appeals, to-wit: about the 25th day of May, A. D. 1895, your petitioner, appellant in said cause, filed in and submitted to said Circuit Court of Appeals its petition for rehearing in due form, setting up and alleging, among other things, as cause why a rehearing of said cause should be granted, and said decree of the Circuit Court reversed and ordered to be dismissed for want of jurisdiction, as follows to-wit:

"The Circuit Court for the Eastern District of Texas, was without jurisdiction to hear and determine this cause, because the controversy was not 'wholly between citizens of different states,' and all the proper and necessary parties plaintiff were not citizens of different states from the proper and necessary parties defendant, when arranged according to their respective interests as apparent of record, and for that,

1st. Lewis S. Schluter, the trustee in the trust deed sought to be foreclosed, was and is a citizen of the same state as the defendant, the Kildare Lumber Company, the debtor against whom the decree of foreclosure was prayed and decreed, to-wit: the State of Texas;

2nd. W. B. Ward, who was made a defendant, was and is a citizen of the same state as the defendant, Kildare Lumber Company, against which Company said W. B. Ward sought by cross-bill and obtained personal judgment

and decree of foreclosure for debt secured by the same trust deed sought to be foreclosed by plaintiff;

All which appears from the allegations of plaintiff's bill, and the record herein."

Which petition for rehearing was by said Court overruled and a rehearing refused, on the 4th day of June, A.D. 1895.

Your petitioner respectfully states that the Honorable Supreme Court of the United States adjourned on the 3rd day of June, 1895, until the next regular term in course, and your petitioner therefore could not present this application for certiorari during the term of said Honorable Supreme Court after refusal of said petition for rehearing, and for this reason now presents the same.

Your petitioner respectfully states and submits unto your Honors that the United States Circuit Court for the Eastern District of Texas was, at the time of the filing of the original bill and ever after, wholly without any jurisdiction of the parties to and subject matter of said suit for the reasons hereinbefore stated and urged by demurrer and plea in said Circuit Court, and by assignment of error and brief and by petition for rehearing in the said Circuit Court of Appeals, to-wit: because the controversy was not "wholly between citizens of different states," and all the proper and necessary parties plaintiff were not citizens of different States from the proper and necessary parties defendant, when arranged according to their respective interests as apparent of record, the trustee, L. S. Schluter, and the co-incumbrancer with the plaintiff, W. B. Ward, defendants, both being citizens of the same state with defendant debtor, the Kildare Lumber Company.

Your petitioner states that no controversy is shown by the record between plaintiff and the trustee Schluter, nor between plaintiff and defendant Ward.

Your petitioner states that there was not at the time of the filing of the original bill herein, and has never been since and is not now any Statute in force in the State of Texas to the effect that a trustee of real estate in a deed of trust to secure the payment of a debt with power to sell shall not take the legal title to the trust estate conveyed thereby, nor is there nor has there ever been a Statute of the State of Texas to the effect that such a trustee is not a proper or necessary party to a bill to foreclose such deed of trust; and your petitioner respectfully submits to your Honors that under the laws of the United States, and the decisions of the Courts of the United States, such a trustee *is* invested with the legal title to the trust estate, and is a proper, necessary and indispensable party to a bill to foreclose such deed of trust in the Courts of the United States.

Your petitioner respectfully states and submits that a question of gravity and importance and one involving the uniformity of decision in the Courts of the United States and the jurisdiction of such Courts is herein presented to your Honors for determination.

Wherefore, your petitioner prays for a writ of certiorari to the said Circuit Court of the United States for the Fifth Circuit, requiring said Court to certify and remove the said cause and the Record thereof to the Supreme Court of the United States for revision, correction and final determination; and that upon final hearing by your Honors, the judgment of said Circuit Court of Appeals and the decree of the United States Circuit Court for the Eastern District of Texas be reversed, with directions to dismiss the bill for want of jurisdiction, and for such other relief as may be

appropriate and proper in the premises, and your petitioner will ever pray, etc.

Chas. A. Todd
Collin W. Rodgers
Of Counsel

M. E. Crawford

Solicitor for petitioner, Kildare Lumber Co.

DEC 10 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 780.

THE KILDARE LUMBER COMPANY, APPELLANT,

vs.

THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, MISSOURI, ET AL.

OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

CHARLES S. TODD,
Solicitor for Petitioner, The Kildare Lumber Company.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

(16,070.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 780.

KILDARE LUMBER COMPANY, APPELLANT,

vs.

NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO., ET AL., APPELLEES.

Now comes the petitioner, The Kildare Lumber Company, by counsel, and, resisting the motion to dismiss the petition for writ of certiorari herein, says said motion ought not to be granted because of the facts set forth in the affidavits and exhibits hereto attached and herewith filed.

CHARLES S. TODD,
Solicitor for Petitioner, Kildare Lumber Company.

Petitioner respectfully cites the following authorities:

New Orleans vs. N. O., &c., R. Co., 108 *U. S.*, 15.
Micas vs. Williams, 104 *U. S.*, 556.
Zeigler vs. Hopkins, 117 *U. S.*, 683.
Graham vs. Boston, &c., R. Co., 118 *U. S.*, 161.
Koehler vs. Black River Falls Iron Co., 2 *Black*, 715.
2 *Cook, Stock and Stockholders*, § 652 *et seq.*

IN THE SUPREME COURT OF THE UNITED STATES.

THE KILDARE LUMBER COMPANY, *Appellant*,
vs.
THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, Mo., *Appellee*.

On petition for writ of certiorari.

Affidavit of J. H. Bemis.

THE STATE OF TEXAS,
County of Bowie.

Before me, the undersigned authority, personally came J. H. Bemis, who, being by me duly sworn, on his oath deposes and states as follows:

The Kildare Lumber Company was organized by purchasers of the property of the Jefferson Lumber Company at receiver's sale thereof, said property being then of the estimated value of three hundred thousand ($300,000) dollars. In the plan of organization it was agreed that the National Bank of Commerce of Kansas City, Mo., and W. B. Ward should each receive stock of the Kildare Lumber Company aggregating 60 per cent. of their respective claims against the Jefferson Lumber Company and the notes of the Kildare Lumber Company for the remaining 40 per cent. of such claims, secured by trust deed on all the property. It was also understood and agreed that certain other creditors of the Jefferson Lumber Company should receive stock of the Kildare Lumber Company to the full amount of their claims against the Jefferson Lumber Company, the entire capital stock not to exceed $300,000. Upon organization W. B. Ward, Elijah Robinson, T. J. Rogers, W. B. Ward, Jr., and A. H. Schluter were chosen directors and W. B. Ward president, A. H. Schluter secretary and treasurer, and J. H. Bemis, the affiant, general manager of said Kildare Lumber Com-

pany. The active management of the property was intrusted to J. H. Bemis, general manager, with full power and authority to operate the business and employ counsel in all litigation of the company, and do all other things pertaining to the management of said business. That in pursuance of the plan of organization stock of said company was issued as follows:

W. B. Ward	542.66	shares,	$54,266 00
Church J. White (cashier National Bank of Commerce of Kansas City, Mo.	381.61	"	38,161 00
Elijah Robinson	10.00	"	1,000 00
	934.27		$93,427 00
Howard F. O'Neal, president Linden bank	110.43	"	
Grigsby Bros.	203.21	"	
Benj. Whitaker	139.41	"	
Sulphur Lumber Co.	101.69	"	
J. B. Alexander	449.00	"	
A. Weinstein	69.09	"	
W. C. Pierce, president Marshall National bank	39.20	"	
	1,112.03	"	111,203 00
Erastus Jones	378.00	"	37,800 00
J. M. Bemis	288.97	"	28,897 00
Total	2,713.27	"	$271,327 00

Nominal. { T. J. Rogers, 1 share, $100.
A. H. Schluter, 1 share, $100.
W. B. Ward, Jr., 1 share, $100.

and the notes to the National Bank of Commerce and Ward and deed of trust to secure same were executed and delivered.

Affiant says that by reason of the failure and refusal of the National Bank of Commerce to surrender and cancel its claims against the Jefferson Lumber Company, which

was the consideration for the notes and stock issued to it, affiant, as general manager, and W. B. Ward, as president, of the company, having conferred together, refused to pay the note held by the National Bank of Commerce unless such claims against the Jefferson Lumber Company were delivered and canceled; and thereupon the National Bank of Commerce brought this suit, filing its original bill in the United States circuit court at Jefferson, Texas, for foreclosure and for appointment of a receiver. Upon *ex parte* application a receiver was appointed and placed in possession of the property and mills, which were then in successful operation; that thereupon affiant, as general manager, employed Messrs. Todd & Rodgers, a firm of attorneys and solicitors, to defend said proceedings; that upon motion presented by them as counsel for the Kildare Lumber Company, after full hearing of evidence at chambers, the court vacated the receivership and discharged the receiver, holding that such receiver had been improvidently appointed, and continued the bill for hearing as a bill for foreclosure only. This order was not excepted to nor appealed from. Thereafter the cause was tried and a decree of foreclosure rendered, as appears by the record, and the defendant, Kildare Lumber Company, appealed from the decree of foreclosure to the United States circuit court of appeals, which court affirmed the decree of the circuit court; that throughout this litigation, extending over a period of about two years, the Kildare Lumber Company was represented by Messrs. Todd & Rodgers as its counsel, with the full knowledge, consent, and approval of and without objections from the president and all the directors of the Kildare Lumber Company.

Affiant states that after affirmance of said decree he was advised by his counsel that in their opinion the judgments of the circuit court and of the United States circuit court of appeals were erroneous in holding that the circuit court had jurisdiction of the cause, and advised that the Kildare Lum-

ber Company apply to the Supreme Court of the United States for a writ of certiorari; that thereupon affiant, as general manager of, and Chas. S. Todd, as counsel for, said Kildare Lumber Company, called upon W. B. Ward, president of said company, and conferred with him in regard to the matter of applying for certiorari; that upon full consultation said Ward consented to, advised, and directed that such application be made and himself personally advanced the money required to print the records, petition for certiorari, and brief, amounting to $154, which was paid by said Ward upon the draft of said Chas. S. Todd; that said Chas. S. Todd proceeded to prepare the petition for certiorari, brief, and argument, and caused the same and the transcript of the record to be printed, and the expenses thereof were paid by said W. B. Ward as aforesaid; that on the 2d day of September, 1895, said petition, brief, and record had been printed and were ready for filing and presentation to the honorable Supreme Court.

Affiant states that the action of the directors, Ward, Robinson, and Rogers, on September 2, 1895, whereby they procured the passage of the resolution attempting to abandon and withdraw the application for certiorari, was had without the knowledge of affiant or of counsel for the Kildare Lumber Company and without the knowledge or consent, as affiant is informed, believes, and charges, of any of the stockholders or creditors of said Kildare Lumber Company save the said Robinson, Ward, and Rogers; that on said 2d day of September the holders of stock of said Kildare Lumber Company were as follows, with number of shares and par value of stock, viz.:

W. B. Ward	542.66	shares,	$54,266 00
Church J. White (cashier National Bank of Commerce)	381.61	"	38,161 00
Elijah Robinson	10.00	"	1,000 00
J. H. Bemis	1,112.03	"	111,203 00
Erastus Jones	378.00	"	37,800 00
J. M. Bemis	288.97	"	28,897 00
Total	2,713.27	"	$271,327 00
T. J. Rogers, 1 share, $100 A. H. Schluter, 1 " 100 W. B. Ward, Jr., 1 " 100			300 00
Total			$271,627 00

Affiant further says that he is advised and believes that said action of said directors was fraudulent, collusive, and void for this:

The said Elijah Robinson was then and now is the attorney, counselor, and agent of the National Bank of Commerce of Kansas City, Mo., and had and has no personal interest in the Kildare Lumber Company, but is merely the representative on the board of directors of the National Bank of Commerce of Kansas City, Mo., principal appellee herein; that W. B. Ward, appellee herein, is and has ever been president of the Kildare Lumber Company, but is personally and pecuniarily interested in the decree in this cause adversely to the Kildare Lumber Company, for that he has judgment and decree for foreclosure herein for more than $5,000; that T. J. Rogers, appellee herein, has never owned any stock in said Kildare Lumber Company, and only held and holds one share of the nominal value of $100, which was and is in his name only to enable him to qualify as a director; that he is an appellee herein and adversely interested in the decree against the Kildare Lumber Company to the extent of about $12,000, for which he has a decree of foreclosure herein; that the National Bank of Commerce, represented by Elijah Robinson, T. J. Rogers,

and W. B. Ward, are the sole opposing parties in this suit against the Kildare Lumber Company, and they have fraudulently colluded and combined together to use their position as directors to surrender and sacrifice the interest of the Kildare Lumber Company, of which they were and are directors and trustees, in order to subserve their own personal pecuniary interest; that they have formed themselves into a syndicate for the purpose of purchasing the property of the Kildare Lumber Company at a sacrifice and to the detriment and injury of the stockholders and creditors, and, being fearful of the application for certiorari herein, have combined and colluded together to defeat the same and prevent a hearing thereof by using their position as directors of the Kildare Lumber Company to abandon and surrender the cause of said company, and thereby subserve their own individual and personal pecuniary interests at the sacrifice of all the rights and interests of the Kildare Lumber Company and the other stockholders and creditors thereof.

Affiant states that he is informed and believes that in pursuance of the said collusion and conspiracy between the said Ward, Robinson, and Rogers they did, on the day following the passage and adoption of said resolution, to wit, September 3, 1895, bid in and purchase all the property under an order of sale issued upon the decree of foreclosure herein in violation of their duty and trust as directors of said Kildare Lumber Company, bidding therefor the sum of $45,000, which affiant states is less than one-third of the value of said property; that affiant is informed that the purchase was made in the name of W. B. Ward and Elijah Robinson, but with an understanding of some sort with T. J. Rogers; that said sale has not yet been confirmed by the United States circuit court, but was passed at the last term thereof without action to await the action of this Court upon the application for certiorari herein. Affiant says he is joined in the application for certiorari by a large majority of the holders of stock of the Kildare Lumber Company, and that

if this application be dismissed or be not heard and considered said sale may be confirmed, and affiant and all other stockholders and all other creditors of said company will be deprived of their interest and rights, the company will be rendered wholly insolvent, and the said Ward, Robinson, and Rogers will have succeeded in sacrificing all the assets and property of said company to their own great benefit and profit.

J. H. BEMIS.

STATE OF TEXAS, }
County of Bowie. }

Before me, the undersigned authority, personally came J. H. Bemis, who, being by me duly sworn, on his oath states that the facts stated in the foregoing affidavit, in so far as they are positively stated, are true, and in so far as stated upon information and advice he believes to be true, and I hereby certify that the same was subscribed and sworn to by the said J. H. Bemis before me.

Witness my hand and seal of office, at office, in Texarkana, Texas, this 23d day of November, A. D. 1895.

[SEAL.] R. R. BURKE,
Notary Public within and for Bowie County, Texas.

IN THE SUPREME COURT OF THE UNITED STATES.

THE KILDARE LUMBER COMPANY, *Appellant*,
vs.
THE NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO., *Appellee*. } No. 780.

On petition for writ of certiorari.

Affidavit of Chas. S. Todd.

Chas. S. Todd, being duly sworn, on oath states that he has carefully read the affidavit of J. H. Bemis herewith filed, and that so much of same as sets forth the proceedings had in the suit of The National Bank of Commerce of

Kansas City, Mo., *vs.* The Kildare Lumber Company *et al.* from the time of affiant's employment as counsel to the affirmance of the decree by the United States circuit court of appeals is, within the knowledge of affiant, true in substance and effect.

Affiant further states that after said affirmance, about July 25, 1895, he conferred fully with J. H. Bemis, general manager, and W. B. Ward, president, of the Kildare Lumber Company, with reference to making application to the Supreme Court for certiorari upon the jurisdictional question, and was, in view of affiant's position as counsel for the Kildare Lumber Company, instructed and directed by said Ward, president, and Bemis, general manager, to prepare and prosecute a petition for certiorari; that in obedience to said instructions affiant prepared the petition for certiorari and brief in support thereof and caused the same to be printed together with transcript of the record, the said Ward having agreed to pay for such printing; that on July 30, 1895, affiant drew his draft on said W. B. Ward for $154.70, the same being the amount of cost of said printing, which draft was duly honored and paid; that affiant had the records, petition, and briefs printed and about ready for filing in the Supreme Court on September 2, 1895. Affiant says that an order of sale had been procured to sell all the property embraced in the decree on September 3, 1895; that affiant was not present at said sale and knew nothing whatever of the action of Ward, Robinson, and Rogers as directors of the Kildare Lumber Company on September 2, 1895, and the purchase at the sale on September 3, 1895, until the fourth day of September, 1895. Affiant says he called on said Rogers and Ward (said Robinson having left the State) and protested against said action and demanded of said Ward as president to call another meeting of the directors, and notify all stockholders for the purpose of reconsidering said action, but said Ward refused so to do, and said Rogers also refused to co-operate

in so doing. Affiant says that said Ward admitted to him that he believed and so expressed himself to Robinson on the second day of September that the action was illegal and invalid by reason of their adverse interests to the Kildare Lumber Company in the decree; that there was no consideration offered or paid or agreed to be paid to the Kildare Lumber Company as a compromise of the litigation, but the action was had solely in the interest of The National Bank of Commerce, plaintiff, and of T. J. Rogers, as assignee of the Citizens' bank, and of W. B. Ward, who are appellees herein and are throughout the litigation have been the only opposing parties to the Kildare Lumber Company in the suit. Affiant says that F. H. Prendergast, Esq., counsel for T. J. Rogers, stated to affiant in substance and effect that said action of Ward, Robinson, and Rogers was advised by him and Elijah Robinson, because they feared the writ of certiorari would be granted and the decree reversed and dismissed for want of jurisdiction, and their object was to prevent the consideration of the petition for certiorari and procure the dismissal thereof; that Elijah Robinson wrote to affiant on October 23, 1895, the letter hereto attached and referred to, marked "A." Affiant further states that he called on A. H. Schluter, secretary and treasurer and one of the directors of the Kildare Lumber Company, who furnished him, under the corporate seal of said company, the statement of the introduction and vote upon said resolution on September 2, 1895, which is hereto attached, marked "B." Affiant further states that after he became aware of said action of said directors and the circumstances surrounding same he was directed by said J. H. Bemis, general manager, to continue the prosecution of said petition for certiorari, and affiant believed and still believes it is his professional duty so to do.

CHAS. S. TODD.

STATE OF TEXAS,
County of Bowie.

Before me, the undersigned authority, personally came Chas. S. Todd, who, being by me duly sworn, on his oath states that the facts stated in the foregoing affidavit so far as they are positively stated are true, and so far as stated upon information and advice he believes to be true; and I hereby certify that the same was subscribed and sworn to by said Chas. S. Todd before me.

Witness my hand and seal of office, at Texarkana, Texas, this twenty-third day of November, A. D. 1895.

[SEAL.] R. R. BURKE,
Notary Public within and for Bowie County, Texas.

"A."

Answered 10, 26, '95.

Martin L. Clardy, general attorney; Elijah Robinson, ass't attorney.

The Missouri Pacific Railway Co. (leased, operated, and independent lines), general attorney's office, St. Louis, Mo.

KANSAS CITY, MO., *October* 23, 1895.

CHAS. S. TODD, Esq., *Texarkana, Texas.*

DEAR SIR: I am just in receipt of your letter of 21st inst. saying to me that you have requested the clerk of the United States Supreme Court to set down the case of Kildare Lumber Company *vs.* National Bank of Commerce of Kansas City, Mo., for hearing on petition of the Kildare Lumber Company for writ of certiorari on Monday, December 9, 1895.

While accepting service of notice contained in your letter, I do not admit, but on the contrary deny, your right to appear for the Kildare Lumber Company in the case men-

tioned. You must be aware of the resolution passed by the Kildare Lumber Company on September 2nd directing the attorneys who had theretofore appeared for said company in the litigation between it and the National Bank of Commerce of Kansas City and others not to litigate the matter further.

I mention this resolution and deny your right to appear in the Supreme Court, lest my acceptance of service might be construed as an admission that you had a right to further prosecute said case.

I would be glad if you would advise me by return mail what course (in view of the resolution of the Kildare Lumber Company above mentioned) you intend to pursue.

Yours truly, ELIJAH ROBINSON.

"B."

Office of A. H. Schluter & Co., wholesale grocers.

JEFFERSON, TEXAS, *Nov.* 7, 1895.

This is to certify that on the 2nd day of September, 1895, the board of directors of the Kildare Lumber Company consisted of W. B. Ward, president; T. J. Rogers, Elijah Robinson, W. B. Ward, Jr., and A. H. Schluter, secretary; that at said meeting on the said 2nd day of September, 1895, at which a resolution was passed directing the withdrawal of the litigation in the case of The National Bank of Commerce of Kansas City, Mo., *vs.* The Kildare Lumber Co., the following directors were present, to wit, W. B. Ward, Elijah Robinson, T. J. Rogers, and A. H. Schluter; that when said resolution was introduced by Elijah Robinson and when voted upon Elijah Robinson, W. B. Ward, and T. J. Rogers voted in favor of same and A. H. Schluter did not vote at all, and the resolution was declared adopted.

[SEAL.] A. H. SCHLUTER,

Sec. and Treas. Kildare Lumber Co.

SPENCER, MASS., *Dec.* 5, 1895.

CHAS. S. TODD, Esq.

DEAR SIR: Your letter of the 19th ult. received. Mr. Bemis has requested me to write you at Washington, D. C.

You will please act for me, a stockholder in the Kildare Lumber Co., in endeavoring to obtain a hearing in the Supreme Court of the United States upon the conditions stated in your letter.

Yours truly, ERASTUS JONES.

WARREN, PENNA., *Dec.* 5, 1895.

Know all men by these presents that I, J. M. Bemis, of the borough of Warren, county of Warren and State of Pennsylvania, have made, constituted, and appointed Chas. S. Todd, Esq., my attorney, and do hereby fully authorize and impower him to act for me, as my attorney, in all proceedings in the courts of the United States against the Kildare Lumber Company, and especially in the proceedings upon certiorari from the United States circuit court of appeals to the Supreme Court of the United States in the suit or suits by the National Bank of Commerce of Kansas City, Mo., or by any other parties whatever, against said Kildare Lumber Company, my interest being that of a stockholder in said Kildare Lumber Company.

J. M. BEMIS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE KILDARE LUMBER COMPANY,
Petitioner,

VERSUS

THE NATIONAL BANK OF COMMERCE,
Of Kansas City, Mo., *et al.*,
Respondents

Answer and Brief of Respondent,

T. J. Rogers,

In Opposition to Petition for Writ of Certiorari.

ELIJAH ROBINSON.
Solicitor for Respondent,
T. J. ROGERS, *Assignee.*

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE KILDARE LUMBER COMPANY,
Petitioner,
VERSUS
THE NATIONAL BANK OF COMMERCE,
Of Kansas City, Mo., *et al.*,
Respondents

BRIEF ON BEHALF OF RESPONDENT, ROGERS, IN OPPOSITION TO GRANTING CERTIORARI.

I.

It clearly appears that the Kildare Lumber Company, having had a trial on the merits in the Circuit Court, and the judgment of the Circuit Court having been affirmed by the Circuit Court of Appeals, desires to stop the litigation, and that the application for certiorari herein is made without authority from said company and is against its wishes.

This is shown by the resolution adopted by the

board of directors of said corporation, a copy of which is attached to the respondent's answer herein.

Said respondent respectfully insists that this application should for that reason be dismissed.

II.

The complainant, the National Bank of Commerce, had a right to sue in the Federal Court for the foreclosure of its mortgage, and also had a right to make W. B. Ward a party defendant, although his note was also secured by the mortgage sought to be foreclosed. There was a question as to what remained due on Ward's note, and the plaintiff had a right to make him a party defendant for the purpose of having the court determine that question. Moreover, Ward's interests were in every aspect of the case antagonistic to those of the plaintiff.

Acting in accordance with his interest, Ward, who was president of said company, refused to pay plaintiff's claim. (See Record, page 13.) He also signed the answer of the company in this case. (Record, page 44.) He also testified against the complainant. (Record, page 168–170.) He also signed the writ of error bond. (Record, page 275.)

III.

The complainant properly made the Citizens' Bank, of which this respondent, T. J. Rogers, is

assignee, a party respondent, for the purpose of cancelling the lien, which said bank claimed was superior to plaintiff's lien, and the fact that Rogers sued by cross bill to foreclose his lien would not oust the court of its jurisdiction.

Respondent, Rogers, as assignee of the Citizens' Bank, was permitted to defend and file a cross bill (Record, 52-53.) A receiver was applied for. (Record, page 18.)

IV.

The fact that L. S. Schluter, the trustee in the mortgage, was made a party defendant, in no way affected the question of jurisdiction. He was a mere formal party, without any interest whatever in the subject matter of the litigation and without any right to control the litigation, and was, in fact, not a necessary party to the suit.

The rule is well settled that the citizenship of such a party does not affect the question of jurisdiction This is true, even though the legal title to the property in question had been vested in him by the terms of the mortgage sought to be foreclosed.

But it has long been settled in the State of Texas that a trustee, with the naked power of sale, in a deed of trust given to secure the payment of debts, takes no title.

McLean v. Paschal, 47 Texas, 366.

And this court has heretofore recognized that rule as being in force in said state.

Ewell v. Daggs, 108 U. S., 147.

The case of *Harter v. Twohig* contains no general principle, but is only an application of statutory construction.

Respectfully submitted,

ELIJAH ROBINSON.

Solicitor for Respondent,

T. J. ROGERS, *Assignee.*

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE KILDARE LUMBER COMPANY,
Petitioner,

VERSUS

THE NATIONAL BANK OF COMMERCE,
Of Kansas City, Mo., *et al.*,
Respondents

ANSWER OF T. J. ROGERS, ONE OF THE ABOVE MENTIONED RESPONDENTS, TO THE PETITION FOR WRIT OF CERTIORARI HEREIN.

Now comes T. J. Rodgers, assignee, one of the respondents in the above entitled cause, and respectfully shows to the Court that the application of the said Petitioner for a Writ of Certiorari in said cause should not be granted, because of the following reasons:

1. The National Bank of Commerce, one of the above named respondents, brought suit against the said petitioner, the Kildare Lumber Company,

and other defendants, in the Circuit Court of the United States for the Eastern District of Texas, in which suit the said Kildare Lumber Company answered to the merits, and in which this respondent, T. J. Rogers, as assignee of the Citizens Bank of Jefferson, Texas, also answered to the merits, and in addition to said answer, filed a cross bill setting up a debt and lien in his favor; and after all the evidence was taken in the case, the said petitioner, the Kildare Lumber Company, filed a plea to the jurisdiction of the court.

This plea to the jurisdiction was overruled and the case tried and a decree entered on the merits.

The cause was appealed to the Circuit Court of Appeals, in which court the decree of the Circuit Court was in all things affirmed.

Thereupon the said petitioner, the Kildare Lumber Company, at a meeting of its Board of Directors on the 2d day of September, 1895, adopted a resolution to the effect that said company would not further question the validity of the judgment in said cause, instructing the attorneys who had theretofore been representing the petitioner in said litigation not to apply for a writ of certiorari, or take any further action in the case. (A certified copy of said resolution is hereto attached and made a part hereof.)

Wherefore this respondent says that the application for Writ of Certiorari, now presented to this Court, is made without authority from said Kildare Lumber Company, and against its express desire

in the premises; and this Respondent therefore prays that said application be dismissed.

2. If said petition for Certiorari be heard on its merits, then respondent says:

That the National Bank of Commerce, one of the above named respondents, brought its bill against the petitioner, the Kildare Lumber Company, to foreclose a mortgage and made the other parties defendants because they claimed adversely to said bank.

W. B. Ward, one of said defendants, claimed adversely, as shown by his testimony, where he claimed that the said bank could not recover. (See Record, page 168–170.) He also signed writ of error and bond to reverse the decree. (Record, pages 275–280.)

His interests were antagonistic to those of the said bank; and he was properly made a party defendant, so that the court might ascertain the amount due on his note and decree a foreclosure of the mortgage.

L. S. Schluter, the trustee in the mortgage sought to be foreclosed, was a mere formal party; had no interest in the matter in controversy, and could not assume any control over the litigation. No relief whatever was asked against him, and he did not answer or otherwise plead to the bill.

T. J. Rogers, assignee claimed a prior lien on the property, and was made a defendant for the purpose of having his claim cancelled. He filed a

cross bill and obtained foreclosure. His contest was against the plaintiff.

So this respondent says that the suit did really and substantially involve a dispute or controversy properly within the jurisdiction of the court; because there was a real dispute between the plaintiff and all of the defendants except L. S. Schluter, and he was a mere nominal party.

Said respondent therefore prays that said application for writ of certiorari be refused.

ELIJAH ROBINSON.

Solicitor for Respondent,
T. J. ROGERS, *Assignee.*

cross bill and obtained foreclosure. His contest was against the plaintiff.

So this respondent says that the suit did really and substantially involve a dispute or controversy properly within the jurisdiction of the court; because there was a real dispute between the plaintiff and all of the defendants except L. S. Schluter, and he was a mere nominal party.

Said respondent therefore prays that said application for writ of certiorari be refused.

ELIJAH ROBINSON.

Solicitor for Respondent.

T. J. ROGERS, *Assignee.*

780

DEC. 7
JAMES H. MCKENNEY
Clerk

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1895.

THE KILDARE LUMBER CO., *Petitioner,*

vs.

THE NATIONAL BANK OF COMMERCE, of Kansas City, Mo., *et al.*, *Respondents.*

Answer, Statement and Brief of National Bank of Commerce, in Opposition to Petition for Writ of Certiorari.

ELIJAH ROBINSON.
Solicitor for said Respondent.

GERARD WOODY PRINTING CO., N. Y. LIFE BLDG., KANSAS CITY, MO.

IN THE

SUPREME COURT

—OF THE—

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THE KILDARE LUMBER CO., *Petitioner,*

vs.

THE NATIONAL BANK OF COMMERCE, of Kansas City, Mo., *et al.*, *Respondents.*

Answer of Respondent, the National Bank of Commerce, to the Petition for Writ of Certiorari Herein.

Now comes the National Bank of Commerce, one of the respondents in the above entitled cause, and respectfully shows to the court that the writ of certiorari prayed for in the above entitled cause, should not be issued for the following reasons:

1. The petitioner, the Kildare Lumber Company, has not authorized the presenting of the peti-

tion for a writ of certiorari herein; but on the contrary, has expressly declared that it does not wish this litigation protracted, nor an application made for said writ. After the judgment of the circuit court for the Eastern District of Texas had been affirmed by the circuit court of appeals, the board of directors of the said Kildare Lumber Company, on September 2nd, 1895, adopted a resolution to the effect that it would not further carry on the litigation in this cause, and instructing the attorneys who had theretofore represented said corporation not to apply for a writ of certiorari or take any further steps in the case.

A certified copy of said resolution is hereto attached and made a part hereof.

Said respondent therefore prays the Court to dismiss the petition for certiorari herein.

2. There is involved in this case no question of such gravity and importance as to invoke the exercise of the power conferred on this Court to issue the writ of certiorari for the review of the decision of the circuit court of appeals in this case. The suit is a proceeding in equity to foreclose a deed of trust. The trustee, who is a resident of the same state as the Kildare Lumber Company, which executed the deed of trust, was made a party defendant, but he is a mere nominal party without any interest whatever in the controversy. No relief whatever was asked against him, nor did he answer

or otherwise plead to the bill. He was not even a necessary party.

W. B. Ward, the holder of a note secured by the same deed of trust as that held by the plaintiff, was also made a party defendant. It is charged in the bill that payments have been made on his note, but that the amount remaining due thereon was unknown to the complainant. His interests were antagonistic to those of the complainant; and he was therefore made a party defendant, which fact did not defeat the jurisdiction of the court.

3. A review of the decision of the circuit court of appeals in this case is not called for in the interests of uniformity of decisions; because no other court has, under the same conditions, rendered a decision in conflict with the decision of the circuit court of appeals in this case.

Said respondent therefore respectfully prays that the writ of certiorari prayed for may be denied.

ELIJAH ROBINSON,

Solicitor for Respondent, the National Bank of Commerce of Kansas City, Mo.

STATEMENT.

On the 13th day of July, 1892, the Kildare Lumber Company purchased from W. B. Ward, W. B. Chew, John M. Bemis and Elijah Robinson, certain property which they had theretofore purchased at a public sale made by the receiver of a corporation called the Jefferson Lumber Company. The consideration to be paid to said parties for said property was, in round numbers, $170,900; and the said parties were to receive for their respective interests in said property, sums as follows; W. B. Ward, $94,250; W. B. Chew, $3,250; John M. Bemis, $3,250, and Elijah Robinson, $69,250 (round numbers). These amounts were to be paid in the following manner: To W. B. Ward notes of said corporation for $39,693.10 and the balance in stock in said corporation. To W. B. Chew a note of said corporation for $3,250; to John M. Bemis a note of said corporation for $3,250, and to Elijah Robinson the notes of said corporation for $30,148.79, and the balance in stock of said corporation; all of said notes to be secured by deed of trust on the property of said corporation. The said sale was made in pursuance of a contract entered into by and between the said Ward, Chew, John M. Bemis and Robinson, on the 3d day of May, 1892 (page 128 printed record), and the consideration to be paid is set forth in a resolution of

the board of directors of said corporation, which is copied into the deed of trust executed by it. The property was conveyed by said parties to said corporation, and it executed to them its notes and deed of trust, according to the agreement. (Page 131 printed record.)

L. S. Schluter was named as trustee in said deed of trust, and it was intended to vest in him power to sell the property conveyed by the deed of trust, in case of default in the payment of any of the said notes; but the provisions of the law theretofore recently enacted by the legislature of the State of Texas, requiring real estate to be sold in the county in which located, was overlooked by the parties at the time said deed of trust was drawn, and it was therein provided that the real estate which was located in Cass County, should be sold in the city of Jefferson, in Marion County, and for that reason the said trustee had no power to act.

The notes executed by said company to said Robinson were by him transferred to the respondent, the National Bank of Commerce of Kansas City, Mo.; and the stock of said corporation which said Robinson was to receive in part payment of the purchase price of his interest in said real estate was issued to him and one C. J. White; and by them held for the use and benefit of the said respondent.

The notes executed by said company to Chew and John M. Bemis were paid off and fully dis-

charged; the notes to Ward were partially paid; but nothing whatever was paid on the notes executed to said Robinson and transferred to respondent as aforesaid.

The property conveyed by said Ward, John M. Bemis, Chew and Robinson, to said appellant, and which was covered by the deed of trust aforesaid, had formerly belonged to the above mentioned Jefferson Lumber Company; and prior to the appointment of a receiver for said company, its president, one J. H. Bemis, had executed for and in the name of said company a deed of trust covering the aforesaid property, to secure various notes alleged to be due to divers parties, among whom was the Citizens Bank of Jefferson, Texas. It was claimed by the said appellant, The Kildare Lumber Company, and by the said parties from whom it purchased the aforesaid property, that said deed of trust, executed by the president of said Jefferson Lumber Company, was executed without authority and was, for that and other reasons, fraudulent and void. Upon default being made by said appellant in the payment of said notes held by said National Bank of Commerce, it caused to be instituted this action to foreclose said deed of trust and have said property sold for the payment of the amount due it as aforesaid. There still being something due to Ward on his notes, and his interest being antagonistic to the complainant, it made him a defendant and asked

that the amount due him be ascertained. The Citizens Bank of Jefferson (now represented by T. J. Rogers as assignee, who was subsequently substituted as defendant) was also made a defendant, and it was asked that the said deed of trust executed by the president of the Jefferson Lumber Company be set aside. The trustee named in the said Jefferson Lumber Company deed of trust was also made a party and it was asked that he be enjoined from selling said property under said deed of trust. The trustee in the deed of trust sought to be foreclosed was also made a party defendant; *but he had no interest whatever in the controversy; no relief whatever was asked against him, and he was a mere nominal, and not at all necessary party.*

James H. Bemis, who was manager of the Kildare Lumber Company, and in charge of its business and assets, was also made a defendant. It was charged that he was mismanaging the business of the corporation and appropriating its assets to his own use; and that the majority of the directors of said corporation would take no steps to prevent such mismanagement and misappropriation, and the appointment of a receiver was therefore prayed.

A receiver was appointed and subsequently discharged.

The appellant, Kildare Lumber Company, answered, admitting the execution of the notes held by complainant, and the deed of trust, but alleging

that said notes were given by the Kildare Lumber Company in payment of certain claims held by said complainant against the said James H. Bemis and the said Jefferson Lumber Company, and that the paper evidencing said claims was to have been surrendered, but that said complainant had refused to surrender the same.

The said Rogers, assignee of said Citizens Bank, filed a cross-bill, setting forth the amount due him, the validity of the said Jefferson Lumber Company's deed of trust, and praying that he be adjudged to have a first lien, etc.

After the evidence had all been taken and on the eve of the trial the said appellant filed a plea to the jurisdiction of the court. This plea was heard and overruled and the case tried on its merits, the trial resulting in a finding of the issues between complainant and said Kildare Lumber Company for complainant, and the issues on defendant Rogers' cross-bill for said defendant; and a decree was entered directing the property to be sold for the amounts due said Rogers, said complainant and said defendant Ward.

From this decree the said Kildare Lumber Company appealed to the United States Circuit Court of Appeals for the Fifth Circuit. In the last mentioned court the case was heard, both on the merits and on the jurisdictional question, and the judgment of the circuit court was in all things affirmed.

Appellant now seeks to have this Court issue a certiorari to bring up the record, and to review the case on the jurisdictional question.

No action was ever taken by the board of directors of the Kildare Lumber Company authorizing its president or general manager to employ counsel or cause any defense to be made in this action; but the president of the company and the manager, James H. Bemis, both of whom had personal interests antagonistic to the said complainant, did employ counsel, who represented said Kildare Lumber Company during the pendency of the case in the circuit court and the circuit court of appeals.

Upon the rendition of a decision by the circuit court of appeals, the board of directors of the said Kildare Lumber Company, becoming convinced that said company had no meritorious defense, and that the litigation was sought to be prolonged at the instigation of said James H. Bemis and solely for his individual benefit, held a meeting on Sept. 2nd, 1895, and adopted the following resolution:

"Whereas, The board of directors of the Kildare Lumber Company, are of the opinion that further litigation in the case of the National Bank of Commerce, of Kansas City, Mo., v. said Kildare Lumber Company, et al, which was instituted in the U. S. Circuit Court for the Eastern District of Texas, and taken by appeal to the U. S. Circuit
v Court of Appeals at New Orleans, where the judgment of the circuit court was affirmed, would be unprofitable, and a useless expenditure of the funds

of said company; and whereas the property of said company is advertised for sale under the judgment in said case, and it is desirable that the same shall sell for as much as possible; therefore be it

Resolved, Hereby, by the board of directors of said company, that said company will not further question the validity of the judgment in said case, either by certiorari or otherwise, and the secretary of this company is hereby instructed to notify the attorneys who have been acting for said company in said case, not to apply for a certiorari or take any other or further action in said case."

BRIEF.

The respondent, the National Bank of Commerce, respectfully insists that the application for a writ of certiorari should be denied, for the following reasons:

First. The said application is made without authority from the appellant, the Kildare Lumber Company.

Second. There is involved in this case no question of such "gravity and importance" as to invoke the exercise of the power conferred on this court to cause the case to be certified here for review and determination.

Third. The question involved in this case is not sufficiently important in itself, nor sufficiently open to controversy, to impose on this court the duty of issuing the writ applied for.

Fourth. There is no conflict between the decision of the circuit court of appeals in this case, and the decision of any other circuit court of appeals calling for the exercise of the jurisdiction of this court.

I

The petition for a writ of certiorari in this cause is presented to this court without any authority from the appellant, the Kildare Lumber Company.

It seems this fact ought to be of itself a sufficient reason for refusing the writ. The record in

this cause discloses the fact that the respondent the National Bank of Commerce has a meritorious cause of action, and that the only shadow of a defense that has been interposed by or in the name of the said appellant at any time throughout the litigation, now extending over a period of more than two years, has been for the benefit of James H. Bemis and not for the benefit of the company. The conduct of the affairs of the corporation is vested in its board of directors; and while the president is *prima facie* authorized to employ counsel and conduct litigation to which the corporation is a party, this power is subject to the control of the directors and may be terminated at any time they see proper to do so. The board of directors of the said appellant, after the judgment of the circuit court had been affirmed by the court of appeals, became convinced that the litigation had been protracted as long as it should be, and, therefore adopted the resolution of September 2nd, 1895, a copy of which is set forth in the foregoing statement. This resolution not only terminates whatever authority was vested in the solicitors theretofore representing the company, but also shows conclusively that this application is made without authority, and in direct opposition to expressed will and desire of the corporation. The over-crowded condition of the dockets indicate that the courts of the country are already overburdened with the labor of disposing of cases which properly come before them; and cer-

tainly in matters of a purely private nature, the processes of this court will not be issued, except at the instance and on the request of the parties litigant.

II.

The purpose of the creation of the circuit courts of appeals was to relieve this court of the oppressive burden of general litigation, and it is now a well established rule, that this court will not review the decisions of those courts, unless questions of gravity and importance are concerned.

In the *Woods* case, 143 U. S. 205, Mr. Chief Justice Fuller, delivering the opinion of the Court, used the following language:

"This must necessarily be so in any view, and especially when it is considered that the circuit courts of appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice."

Again, in the case of *Lau Ow Bew*, 141 U. S. 587, it was said:

"It is evident that it is solely questions of gravity and importance that the circuit courts of appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final, to be certified, can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order

that the case may be reviewed and determined as if brought here on appeal or writ of error.

"Therefore, this branch of our jurisdiction should be exercised sparingly and with great caution."

In this case there is involved no question of such "*gravity and importance*" as to warrant an application to this court for the writ of certiorari to review the decision of the court of appeals.

The question as to whether a mere nominal party, *one having no interest whatever in the result of the suit, and against whom no relief whatever is asked*, should be aligned on the side of the plaintiff or on the side of the defendant, is not one of "*gravity and importance.*" Schluter, the trustee, was not an indispensable party. The suit could have been prosecuted just as well without joining him, either as a plaintiff or a defendant. Doubtless ninety-nine per cent of the cases taken to the courts of appeals involve graver questions than any which have arisen in this case; and it seems that this court must either assume the burden of reviewing practically all the decisions of those courts, or deny this application.

III.

And in order to invoke the jurisdiction of this court, there must not only be involved a question of *grave import*, but it must also be a question so difficult of solution as to require the highest order of ability and the most careful consideration.

No such question is involved in this case. The jurisdictional question which has been raised is of very easy solution. The fact that Schluter, the trustee, was made a party defendant did not divest the court of its jurisdiction; nor did the fact that Ward was made a party defendant.

I. Schluter, the trustee, was a mere formal party without any interest in the controversy, and the fact of his being made a party (which was really unnecessary) did not affect the question of jurisdiction.

This has been the uniform ruling of this court on the subject. As early as 1809, it was held in the case of *Brown v. Strode*, 5 Cranch, 303, that the circuit court had jurisdiction in an action on an executor's bond, wherein the nominal plaintiffs were the justices of the peace of Stafford County, Virginia, and citizens of said state, and the defendant was also a citizen of that state, but the real party in interest was a subject of Great Britain.

The same question was involved in the case of *Wormley v. Wormley*, 8 Wheaton, 421. The action was brought by Mary Wormley and her infant children against H. W. Wormley, her husband, and Thomas Strode and others, to enforce the trusts of a marriage settlement. On the part of the defendant it was claimed that the court had no jurisdiction, because the plaintiffs and H. J. Wormley and one of the defendants, were citizens of the said state. In discussing the question, Mr. Justice Story said:

"But Wormley is but a nominal defendant, joined for the sake of conformity in the bill, against

whom no decree is sought. He voluntarily appeared though, perhaps, he could not have been compelled to do so. Under these circumstances the objection has no good foundation. This court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties who have the real interests before it whenever it can be done without prejudice to the rights of others."

In the case at bar, Schluter was as strictly a nominal party as was Wormley in the case cited. In that case, Wormley had no interest; in this case, Schluter had none. No judgment, or relief of any kind, is asked against him; and he did not answer or otherwise plead to the bill.

In the case of *McNutt v. Bland*, 2 Howard, 9, the question again arose. That was an action on a sheriff's bond, brought by citizens of the State of New York in the name of the governor of the State of Mississippi, against the sureties on the sheriff's bond, who were also citizens of said state. On the part of the defendants it was contended that the court had no jurisdiction because the nominal plaintiff, the governor, was a citizen of the same state with the defendants. Mr. Justice Baldwin delivered the opinion of the court, and in discussing the question of jurisdiction said:

"He is a mere conduit through whom the law affords a remedy to the person injured by the acts or commissions of the sheriff; the governor cannot prevent the institution or prosecution of the suit, nor has he any control over it. The real and only

plaintiffs are the plaintiffs in the execution, who have a legal right to make the bond available for their indemnity, which right could not be contested in a suit in a state court of Mississippi, nor in a circuit court of the United States, in any other mode of proceeding than on the sheriff's bond."

As was said of the governor in that case, we may say of the trustee in this case; *he had no real interest in the controversy, and could not prevent the institution or prosecution of the suit, nor has he any control over it.*

In the case of *Huff v. Hutchinson*, 14 Howard 586, the nominal plaintiff, Hutchinson, was a citizen of the state of Wisconsin, as were also the defendants; but the suit was based on an attachment bond which had theretofore been executed to said plaintiff as United States Marshal, and was brought for the use of certain parties who were citizens of the State of New York; and it was held that the circuit court had jurisdiction, notwithstanding the fact that the plaintiff and the defendants were citizens of the same state.

In the case of *Waldron v. Skinner*, 101 U. S. 558, the exact question as to the effect of a mere nominal party on the jurisdiction was again decided by this court. Mr. Justice Clifford, delivering the opinion of the court, said:

"Two of these remarks will be sufficient to show that the objection that the circuit court has no jurisdiction to enter the required decree against the executors of the deceased trustee cannot be sustained. Jurisdiction as between the complainant

and respondent is unquestionable; and, if so, it is clear that the fact that the trustee if living was a citizen of the same state with the complainant would not defeat the jurisdiction in a case where he is a mere nominal party, and is merely joined to perform the ministerial act of conveying the title if adjudged to the complainant. Where that is so, the executor, in case of the decease of the trustee, if authorized by the law of the statute to execute such a conveyance, may also be joined in the suit under like circumstances merely to accomplish the like purpose. Where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act, who has not nor ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists. *McNutt v. Bland*, 2 How. 9, 15; *Browne v. Strode*, 5 Cranch 303; *Coal Co. v. Blatchford*, 11 Wall. 172, 177.

"Cases arise in the federal courts in which nominal or even immaterial parties are joined on the one side or the other with those who have the requisite citizenship to give the court jurisdiction in the case; and where that is so, the rule is settled *that the mere fact that one or more of such parties reside in the same state with one of the actual parties in the controversy will not defeat the jurisdiction of the court.* Decisive authority for that proposition is found in a recent ruling by Mr. Justice Miller, in which he states to the effect that mere formal parties do not oust the jurisdiction of the court, even if they are without the requisite citizenship, where it appears that the real controversy is between citizens of different states. *Arapahoe County v. Kansas Pacific Railway Co.*, 4 Dill. 277, 283."

A jurisdictional question similar to that involved in the case at bar was passed upon by this court in the case of *Bacon v. Rives*, 106 U. S. 99. In delivering the opinion of the court Mr. Justice Harlan (page 104) said:

"J. Henry Rives, a citizen of Virginia, having been made a defendant, in his capacity as one of the executors of George Rives, it is contended that the suit is not removable into the Circuit Court of the United States. This position cannot be successfully maintained. Without giving all of the reasons which may be assigned in support of the right of removal, it is sufficient to say that he and Charles Edward Rives, executors of George Rives, had no interest in the question, whether the complainants have or not, a cause of action against George C. Rives, on account of the matters set out in the pleadings. They were neither necessary or indispensable parties to the issue between the complainants and the principal defendants. It was of no moment to them whether the one or the other side in that controversy succeeded. It is true that the attachment which the complainants, before the removal of the suit, sued out against George C. Rives, was served upon the executors and levied upon his interest in the estate of his father. But they were made defendants, not because of any connection they had with the main controversy, but to the end that his interest in that estate might be reached and held, subject to such final decree as the complainants might obtain against him. Though made, formally, defendants, they occupied, substantially, the position of mere garnishees. Their citizenship was, consequently, immaterial. The necessary parties, on the respective sides of the controversy, which is the foundation of the litiga

tion, being citizens of different states, the relation of the executors to the suit was properly regarded as merely incidental, arising from the necessity of preserving the means whereby the complainants might, if successful in this suit, obtain satisfaction of their demands against George C. Rives."

As was said in that case, so we say in the case at bar, the trustee, Schluter, *was neither a necessary nor an indispensable party.*

Again in the case of *State of Maryland v. Baldwin*, 112 U. S., 490, this court had occasion to notice the distinction between the position of nominal and formal parties, and that of real parties to a controversy. In that case, an action was brought in the name of the State of Maryland, for the use of Markley, who was a citizen of the State of New Jersey, against the defendants on an administrator's bond, and it was contended on the part of the defendants, that the court had no jurisdiction because the controversy was between the State of Maryland and citizens of said state. This contention was rejected by the court and the jurisdiction was maintained. Mr. Justice Field, in discussing the question said:

"By the law of Maryland the bond of an administrator is taken to the state, but is held for the security of persons interested in the estate of the deceased. The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and in such cases the real controversy is between him and the obligors on the bond. If the residence of these

parties be in different states, the Circuit Court of the United States has jurisdiction."

The reasoning of the court in that case applies with equal force to the case under consideration.

In the still later case of the *State of Indiana to the use of Stanton v. Glover*, 155 U. S. 513, the same question was involved and the same conclusion reached.

On the authority of these cases it is very clear that the court had jurisdiction. Even if Schluter had been a necessary and indispensable party, the jurisdiction would have been maintained, because he had no real interest in the controversy and was a mere formal party.

But he was not a necessary party to the action. He was not possessed of the legal title to the property covered by the deed of trust. He was vested with a mere naked power.

Pom. Eq. Jr., Vol. 2, Sec. 1188, 1190.
Jones on Mortgages, Vol. 2, Sec. 1769.

In view of these decisions it can scarcely be said that the question is *fairly open to controversy*. It is, therefore, not such a question as should call for the exercise of the jurisdiction of this court.

2. That the citizenship of Ward did not defeat the jurisdiction of the court is equally clear.

By the provisions of the act of March 3, 1875, the circuit courts of the United States have jurisdiction of all suits of a civil nature at common law

and in equity * * * *in which there is a controversy between citizens of different states.*

In the removal cases, 100 U. S. 468, the doctrine was announced that "for the purpose of jurisdiction it was the province of the court to ascertain the real matter in dispute, and to arrange the parties on one side or the other of *that dispute*," and if upon the facts as they appeared when the decree was rendered, the court had jurisdiction, that was sufficient.

This doctrine was re-announced in the case of *Pacific Railroad v. Ketcham*, 101 U. S. 278, and has been uniformly adhered to since that time.

In the removal cases there was originally a controversy between the construction company and the railroad company, both citizens of Iowa, and also a controversy between the construction company and the trustees of the mortgage, citizens of different states. However, before the application for removal was presented the controversy between the construction company and the railroad company, the two citizens of Iowa, had been disposed of; and the case was treated by the court as if no such controversy had existed. In discussing the question, Chief Justice Waite, said:

"If the railroad company still continued a party to the suit, it was a mere formal party only, and its interests were in no way whatever connected with those of the trustees. It did not, therefore, occupy a position in the controversy on the same side with them. This being the case, it is appa-

rent that in *the then condition of the suit* the only controversy to be settled was between the mortgage trustees, citizens of Pennsylvania and Ohio on the one side and the construction company and the railroad company, citizens of Iowa, on the other."

In the case at bar, *the real matter in dispute* was between the National Bank of Commerce, the complainant, on the one side, and the defendant, the Kildare Lumber Company, on the other side. This dispute was as to the validity of the notes held by the complainant. It was contended by the defendant corporation that said notes were without consideration. There was no controversy whatever as to the deed of trust. If plaintiff's notes were valid and binding obligations of defendant corporation, it was conceded that it was entitled to a lien by virtue of the deed of trust, and to have the same foreclosed and the property therein described sold for the payment of its claim.

There was no controversy whatever between Ward and the defendant corporation. He set up in his answer the amount of his claim, as by complainant's bill it was prayed he should be required to do. His claim was in no way controverted by the corporation. There was absolutely no dispute between him and the corporation. Ward was president of the defendant corporation and joined with said corporation and J. H. Bemis, its manager, in fighting plaintiff's claim. This was the only controversy in the case, in which Ward was in any way involved.

As was said of the parties to prior mortgages, in the case of *Pacific Railroad Co. v. Ketcham*, 101 U. S. 299, so we may say of Ward in the case at bar; *to the case as it was made, he was but a nominal party, and it is needless to inquire what might have been the result if the controversy had been made between him and the defendant corporation.*

In the *Ketcham case* the suit was brought to foreclose what was called the third mortgage. There were several prior mortgages. The trustees in some of these mortgages were citizens of the same state as Ketcham, and in others the trustees were citizens of the same state as the railroad company; and, notwithstanding this fact, it was held that the court had jurisdiction.

The interests of the complainant and those of the defendant Ward, were really antagonistic to each other. It was charged in the bill that Bemis, the general manager of the company, and Ward, the president thereof, were acting in concert, and without consultation with any other director or stockholder of the corporation, and that the assets were being mismanaged and wasted, if not actually misappropriated; and that there was great danger of complainant losing its claim against said corporation. In view of the claims against the property asserted by the beneficiaries in the old Jefferson Lumber Company deed of trust, it was very doubtful whether the property covered by this deed of trust would be sufficient to pay the claims of the com-

plainant, and that of the defendant Ward. The reasonableness of this proposition is made apparent by the action of the circuit court in requiring an appeal bond in the sum of $30,000; and in the further fact that the appellant failed to execute such bond, but instead thereof simply executed a bond sufficient to cover the costs of the suit.

In the case of *Railroad Company v. Orr*, 18 Wall, 474, it was held that all of the parties secured by the mortgage were necessary parties to a foreclosure proceeding; and that, in case of a doubt as to the sufficiency of the property to pay the claims in full, the interest of each beneficiary was antagonistic to that of every other beneficiary under the mortgage.

In discussing the question, Mr. Justice Hunt said:

"The adequacy of the security of the mortgage for the payment of all the bonds purporting to be secured by it is quite doubtful. The fund is, to some extent, *tabula in naufragio*. It is the interest of every bondholder to diminish the debt of every other bondholder. In-so-far as he succeeds in doing that he adds to his own security."

In the case of *Hotel Co. v. Wade*, 97 U. S., 13, the question under consideration came before this court and was fully discussed in an able and exhaustive opinion by Mr. Justice Clifford. In that case the facts were that the Omaha Hotel Company, a Nebraska corporation, had issued bonds to the amount of $100,000, and secured them

by a mortgage upon its property situated in the State of Nebraska. Some of these bonds were purchased and held by the complainants, who were citizens of the States of Pennsylvania and Ohio. Others of the bonds were held by divers parties, citizens of the State of Nebraska, who were joined as defendants with the hotel company.

It was contended upon the part of the defense that the court had no jurisdiction because of the fact that the hotel company and the holders of a portion of the bonds issued by hotel company, were all citizens of the same state. In discussing the question, the court said:

"Circuit courts, it is admitted, have jurisdiction under the judiciary act, of all suits of a civil nature, at common law or in equity, where the amount in dispute is sufficient, and the suit is between a citizen of the state where the suit is brought and a citizen of another state. L. Stat. 78. Words and phrases of a much wider signification are used in the recent acts of congress defining the jurisdiction of the circuit courts, which provides that those courts have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum or value of $500, and in which there shall be a controversy between citizens of different states. When the decree in this case was entered, the latter provision was in operation, but the suit was commenced before the act which contains it was passed. 18 id. 470.

"Tested by either provision, the Court is of the opinion that the objections to the jurisdiction of

the circuit court cannot be sustained, as the respondents are citizens of the state where the suit is brought, and the complainants are citizens of other states; nor does it make any difference that some of the respondents were joined as such, because they refused to unite with the complainants in the prosecution of the suit. Equity practice in such cases is more flexible than the rules of pleading at common law, and often enables a complainant in equity to maintain the jurisdiction of the court in a case where a plaintiff in an action at law would find it to be difficult to do so, and perhaps impossible to do so.

"Arguments to show that the case made in the record shows that the holders of the overdue and unpaid securities were entitled to sue for the foreclosure of the mortgage or trust deed is unnecessary, as the pleadings and proofs are full and decisive to that effect; and if so, then it is clear that the complainants, under the circumstances of this case, might select the circuit court as the forum for the adjudication of their rights."

Applying these authorities to the facts in this case, it is very clear that the jurisdiction of the court was not affected by the fact that Ward was a citizen of the same state as the defendant corporation.

The case of *Blacklock v. Small*, 127 U. S. 96, cited by appellant, is not in point. In that case the bond which was sought to be collected was a unit; and the assignment of it was a unit. The defendant, Helen Robertson Blacklock, who was a citizen of the same state as Small, the other defendant, was jointly interested with the plaintiffs.

Her interests were indentical with theirs. Whatever sum of money might be collected would belong to them jointly and in equal proportions. It was to her interest to have the plaintiffs succeed.

In the case at bar, it is not to the interest of Ward to have the plaintiff succeed. On the contrary, it was to his interest to have the plaintiff's claim defeated, and it was to the plaintiff's interest to have Ward's claim reduced as much as possible. The difference, in principle, in the two cases is very apparent.

IV.

No other court has, under the same conditions, rendered a decision in conflict with the decision of the court of appeals in this case; and, therefore, the jurisdiction of this court cannot be invoked in the interest of jurisprudence and uniformity of decisions.

There is no conflict between the decision in this case and that in the case of *Rust v. Brittle Silver Co.*, 58 Fed. Reporter, 611. The facts in the two cases are not at all similar.

That case was a suit in equity brought by a citizen of the State of Colorado against the Brittle Silver Company (a Louisiana corporation), Bofinder, Hall and Fenno, citizens of the State of Louisiana, and creditors of said corporation, and Albert S. Frost, trustee in the deed of trust made by said Louisiana corporation to secure said creditors. Frost was a citizen of the State of Colorado,

and was a necessary party, the suit being for the purpose of having the deed of trust declared to be of no effect as against the judgment of the complainant and of compelling Frost, the trustee, to release the premises in question from said deed of trust.

Moreover, Colorado is one of those states in which it is expressly held that the legal title vests in the trustee; while in the State of Texas, the contrary doctrine prevails.

There is no conflict in the decision in this case and that in the case of *Shipp v. Williams*, cited by appellant.

The facts in that case were different from those in the case at bar. In this case the trustee was, by the provisions of the deed of trust, given power to sell the property in case of default (a power he could not exercise for reasons heretofore stated), and that was the only power undertaken to be conferred on him. He could not have prosecuted a suit for the collection of the debts secured by the deed of trust; nor could he exercise any control over the suit instituted by the complainant.

In *that* case the trustees were evidently authorized to collect the debt, and, for that purpose, to prosecute foreclosure proceedings.

In his opinion in the case, Judge Lurton uses the following language:

"It is clear that if Woodworth and Wheeler had filed this bill, as they well might, in their character as trustees, the federal court would have no

jurisdiction, inasmuch as the complainants and the defendants would have been citizens of the same state."

In that case the legal title to property conveyed was in the trustee; while in this case it is not.

That case involved a deed of trust covering property in the State of Tennessee, and governed by the laws of that state. Tennessee is one of those states in which it has been uniformly held that the legal title is vested in the trustee. *This* case involves a deed of trust covering property in Texas, and governed by the laws of the state. In Texas, as well as many other states, it has uniformly been held that the legal title does not vest in the trustee.

Duty v. Graham, 12 Texas, 435.
Morrison v. Bean, 15 Texas, 269.
McLean v. Paschal, 47 Texas, 369.

In the last named case, the Supreme Court of Texas, announced the rule in the following forcible language:

"With whatever force or reason those who have sought to maintain a different conclusion have endeavored to impress their views, and however unsatisfactorily as it may seem to them, their arguments may have been met, it must be admitted that it is now finally and definitely settled by this court, that a deed of trust, to secure the payment of a debt, does not operate as an absolute transfer of the property to which it refers to the trustee upon the trust mentioned in the deed defeasible upon the

conditions therein stipulated, but that such instrument is in legal effect a mere mortgage with a power to sell."

The appellant contends, however, that the United States courts will not, in equity cases, follow local decisions, and in support of this contention cites a large number of cases.

An examination of these cases will show that they are not in point. They simply establish the doctrine that in matters of practice, and matters of general commercial law, the local decisions will not be followed.

On the other hand, it has uniformly been held that in matters of local law, *especially those pertaining to the title to real property*, the law, as established in the state where the property is located, either by statute or judicial decisions, will be followed by the courts of the United States in cases in equity as well as those at law.

In the case of *Beauregard v. City of New Orleans*, 18 How., 497 (a suit in equity), the Supreme Court said:

"The constitution of this court requires it to follow the laws of the several states as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title of lands."

The same doctrine has been announced by this court in the following cases:

Bright v. Rochester, 7 Wheaton, 550 (an action at law).

Daly v. James, 8 Wheaton, 535 (an action at law).

Jackson v. Chew, 12 Wheaton, 162 (an action at law).

Elmendorf v. Taylor, 10 Wheaton, 152 (a case in equity).

McCormick v. Sullivan, 10 Wheaton, 203 (a case in equity).

McGoon v. Scales, 9 Wall., 27 (an action at law).

Clark v. Smith, 13 Peters, 195 (a suit in equity).

Orvis v. Powell, 98 U. S. 176 (a suit in equity to foreclose a mortgage).

Insurance Co. v. Hanford, 143 U. S. 187.

May v. Tenney, 148 U. S. 60.

An examination of the authorities cited by the appellant on this point will show that they do not sustain its contention.

Respondent respectfully prays that the application for writ of certiorari be denied.

ELIJAH ROBINSON,

Solicitor for Respondent, National Bank of Commerce.

The same doctrine has been announced by this court in the following cases:

Bright v. Rochester, 7 Wheaton, 550 (an action at law).

Daly v. James, 8 Wheaton, 535 (an action at law).

Jackson v. Chew, 12 Wheaton, 162 (an action at law).

Elmendorf v. Taylor, 10 Wheaton, 152 (a case in equity).

McCormick v. Sullivan, 10 Wheaton, 203 (a case in equity).

McGoon v. Scales, 9 Wall., 27 (an action at law).

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Orvis v. Powell, 98 U. S. 176 (a suit in equity to foreclose a mortgage).

Insurance Co. v. Hanford, 143 U. S. 187.

May v. Tenney, 148 U. S. 60.

An examination of the authorities cited by the appellant on this point will show that they do not sustain its contention.

Respondent respectfully prays that the application for writ of certiorari be denied.

ELIJAH ROBINSON,

Solicitor for Respondent, National Bank of Commerce.

163 U S 692

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

EX PARTE WILLIAM LOCHREN, COMMISSIONER OF PENSIONS, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS WITH PETITION ANNEXED.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

EX PARTE WILLIAM LOCHREN, COMMISSIONER OF PENSIONS, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

Comes now William Lochren, Commissioner of Pensions, by the Solicitor-General, and moves the court for leave to file his petition for a writ of mandamus to the Hon. C. L. Benedict, judge of the district court of the United States for the eastern district of New York, and to Benjamin L. Benedict, esq., clerk of said court, or either of them, directing the issuance of a subpœna, as prayed in said petition, or for a rule to show cause why mandamus shall not issue for said purpose.

HOLMES CONRAD,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

EX PARTE WILLIAM LOCHREN, COMMISSIONER OF PENSIONS, PETITIONER.

PETITION FOR WRIT OF MANDAMUS.

To the Supreme Court of the United States:

Your petitioner, William Lochren, respectfully represents that he is the Commissioner of Pensions of the the United States; that, in order to pass upon a certain pension claim pending before him as such Commissioner, it is necessary to procure the issuance of a subpœna for one Mathias Fugueira, who is within the jurisdiction of the United States district court for the eastern district of New York, pursuant to the provisions of section 3 of the act of July 25, 1882, chapter 349; that he has accordingly applied to the judge and also to the clerk of said court, pursuant to said section, for the issuance of such subpœna, as is more fully shown by his petition to said judge, hereto annexed; that his applications were refused upon the sole ground that such section was claimed to be unconstitutional and void; that

the merits of his applications have, therefore, never been considered; that annexed hereto and marked Exhibit A is a certified copy of his petition to said judge, together with the action of the judge thereon; that subsequently he applied again to said clerk for such subpœna, and that his application was refused for the same reason; that he thereafter informed said judge and clerk that he intended to apply to this court for the issuance of a mandamus in the premises, and received from them, respectively, the letters hereto annexed and marked Exhibit B and Exhibit C; that he is advised and believes that such action is constitutional and valid, and that he is without remedy in the premises except by such writ of mandamus.

Wherefore your petitioner respectfully prays that said judge and clerk, both or either of them, may be directed to issue a subpœna against said Fugueira; or that a rule be issued against them, or one of them, to show cause why a mandamus should not issue for that purpose; or that your petitioner may have such other writ or rule in the premises as may be in accordance with law.

Washington, D. C., March 27, 1896.

HOLMES CONRAD,
Solicitor-General,
Of Counsel for Petitioner.

EXHIBIT A.

UNITED STATES OF AMERICA,
Eastern District of New York:

I, B. Lincoln Benedict, clerk of the district court of the United States for the eastern district of New York, do hereby certify that the writing annexed hereto is a true copy of a petition, presented to the Hon. Charles L. Benedict, United States district judge for the eastern district of New York, and by the United States attorney thereafter deposited and now remaining in my office.

Witness my hand this 19th day of March, 1896.

B. LINCOLN BENEDICT, *Clerk.*

In the matter of the application of William Lochren, Commissioner of Pensions, for a subpœna for Mathias Fugueira.

Petition.

To the Hon. Charles L. Benedict, United States District Judge for the Eastern District of New York:

William Lochren, Commissioner of Pensions, respectfully represents that a certain claim against the United States is properly pending in the Pension Bureau, to wit, the claim of Michael S. O'Brien, alias Michael Sullivan, now or formerly a second-class fireman in the United States Navy, applying for the issuance to him of a pension under the act of June 27, 1890, chapter 634, entitled "An act granting pensions to soldiers and sailors

who are incapacitated for the performance of manual labor," etc.; that Thomas P. Randolph, a special examiner in said Pension Bureau, has been duly designated and detailed to investigate and examine into the merits of said pension claim; that said special examiner is duly authorized to administer oaths and take affidavits in such investigation and examination, and is duly charged with the duty of ascertaining the origin and nature of claimant's alleged injury, which is claimed to be a disease of the back and spine; that the only person living who is able to give testimony concerning the origin of claimant's injuries is one Mathias Fugueira, a physician, who was in medical attendance upon said claimant at the time when he claims to have been taken ill; that said Fugueira refuses to give testimony in the matter, and by said refusal this petitioner is prevented from ascertaining and deciding the merits of said pension claim; and that by reason of the matters aforesaid, this petitioner will be unable to decide said claim upon its merits unless by the issuance of a subpœna the testimony of said Fugueira can be secured; and that the said Fugueira resides in the city of Brooklyn, within the eastern district of New York; that an application has been duly made to the clerk of said court for such subpœna, and refused.

Wherefore this petitioner, Commissioner of Pensions, hereby applies for the issuance of a subpœna for said Mathias Fugueira to appear on February —, 1896, at ——, in the city of Brooklyn, State of New York, or at such other time and place as may be in the subpœna stated, before said Thomas P. Randolph, special examiner, there to give full and true answers to such written interrogatories and cross-interrogatories as may be propounded, or to be orally examined and cross-examined upon the subject of such claim.

Washington, D. C., February 5, 1896.

WM. LOCHREN,
Commissioner of Pensions.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, B. Lincoln Benedict, clerk of the district court of the United States for the eastern district of New York, do hereby certify that the writing annexed hereto is a true copy of a written decision of the Hon. Charles L. Benedict, United States district judge for the eastern district of New York, annexed to the petition of William Lochren, Commissioner of Pensions, for a subpœna for Mathias Fugueira, and by the United States attorney deposited and now remaining in my office.

Witness my hand this 26th day of March, 1896.

B. LINCOLN BENEDICT, *Clerk.*

This application is denied upon the ground that the act upon which it is based (section 3, chapter 349, laws of 1882, passed July 25) is unconstitutional. Therefore the judge to whom the application is made has no jurisdiction in the premises.

February 7, 1896.

CHAS. L. BENEDICT.

EXHIBIT B.

BROOKLYN, N. Y., *March 24, 1896.*

HOLMES CONRAD, Esq.,
Solicitor-General.

SIR: In reply to yours of the 21st instant, just received, asking to know whether I wish notice of application to the Supreme Court for a rule to show cause, or desire to be heard at any stage of the proceedings, etc., I have to say that I do not desire to receive notice, nor do I desire to be heard in the matter.

Yours, respectfully,

CHAS. L. BENEDICT.

EXHIBIT C.

BROOKLYN, N. Y., *March 24, 1896.*

HOLMES CONRAD, Esq.,
Solicitor-General.

SIR: I have the honor to acknowledge receipt of yours of the 21st instant, numbered 1398–1896, desiring to know whether I wished notice of application to the Supreme Court for rule to show cause, etc., or desire to be heard at any stage of the proceedings.

I beg to be informed whether it is intended to make application for a rule upon the clerk, separate and distinct from a rule upon the judge as to the same matter. If not, I do not wish for notice of the application, nor do I desire to be heard at any stage of the proceedings, provided it is made to appear to the court that the petition for issuance of subpœna was presented to the judge of the district court and the subpœna refused, and that *thereafter* the same petition was presented to the clerk of the district court.

I have the honor to be, yours, respectfully,

B. LINCOLN BENEDICT, *Clerk.*

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

EX PARTE WILLIAM LOCHREN, COMMISSIONER OF PENSIONS, PETITIONER.

ON APPLICATION FOR A WRIT OF MANDAMUS.

BRIEF FOR PETITIONER.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

EX PARTE WILLIAM LOCHREN, COMMISSIONER OF PENSIONS, PETITIONER.

ON APPLICATION FOR A WRIT OF MANDAMUS.

BRIEF FOR PETITIONER.

This is an application for leave to file a petition instituting *mandamus* proceedings against Hon. Charles L. Benedict, United States district judge for the eastern district of New York, and Benjamin Lincoln Benedict, esq., clerk of the district court for that district. Petitioner also applies for the issuance of the writ, or, in lieu thereof, of a rule to show cause, directed to both or either of these gentlemen.

In the absence of the petitioner from the city the petition is signed by counsel, a course approved by this court in the recent proceeding against Judge Parker. The petitioner being a public officer verification is unnecessary. (2 Spelling on Extraordinary Legal Relief, § 1654.)

Petitioner is the Commissioner of Pensions. In order to decide upon a certain application for a pension, it is necessary for him to obtain the testimony of a witness who refuses to testify voluntarily. He accordingly applied under the act of July 25, 1882, ch. 349 (22 Stats., 175), both to the judge and to the clerk of the United States district court for the district where the witness resides, asking that a subpœna be issued to compel his testimony. The judge and clerk both refused to issue the subpœna, taking the ground that the statute was unconstitutional, the judge's memorandum basing his action upon the case entitled *In re McLean*, 37 Fed. Rep., 648, which was decided upon that ground alone.

The question raised being a constitutional one, it is presented to this court instead of to the circuit court of appeals.

The judge and clerk both state that they do not desire to be heard. (Petition, Appendixes B and C.)

The material portion of the statute in question is as follows:

> § 3. * * * Any judge or clerk of any court of the United States in any State, District, or Territory shall have power, upon application of the Commissioner of Pensions, to issue a subpœna for a witness being within the jurisdiction of such court to appear, at a time and place in the subpœna stated, before any officer authorized to take depositions to be used in the courts of the United States, or before any officer, clerk, or person from the Pension Bureau designated or detailed to investigate or examine into the merits of any pension claim and authorized by law to administer oaths and take affidavits in

such investigation or examination, there to give full and true answers to such written interrogatories and cross-interrogatories as may be propounded, or to be orally examined and cross-examined upon the subject of such claim.

It will be noticed that this constitutional question applies equally to §§ 184, 185, and 186 of the Revised Statutes. In view of the duties now imposed upon Federal judges by our legislation (see *Ex parte Riebeling*, 70 Fed. Rep., 310; *United States* v. *Bashaw*, 152 U. S., 436), the question as to the boundaries of judicial power is an important one.

I.

It is respectfully submitted that the issuance of a subpœna in aid of investigations before an administrative officer is a duty properly imposed by Congress upon the judiciary.

The position taken by Judge Benedict is substantially that taken by the dissenting justices of this court in *Interstate Commerce Commission* v. *Brimson*, 155 U. S., at p. 6. These justices cite (p. 10) the same authority upon which Judge Benedict relied in the McLean case, namely, *In re Pacific Railroad Commission*, 32 Fed. Rep., 251. This authority had also been relied upon in the Brimson case at circuit by Judge Gresham in *In re Interstate Commerce Commission*, 53 Fed. Rep., 481.

It would seem, therefore, that the McLean case is in conflict with the Brimson case, and must be regarded as overruled.

It is true that the proceeding directly appealed to this court in the Brimson case was a proceeding in contempt. (*Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447.) The contempt, however, consisted in disobedience to an order of the court directing Brimson and the other respondents to appear and testify before an administrative commission. It is clear from the opinion of Mr. Justice Harlan (pp. 488–9) that it was the order of the court, not the subpœna previously issued by the Interstate Commerce Commission, which was the real basis of the contempt proceedings. It would follow, therefore, that the order (which was equivalent for present purposes to a subpœna) was one which the court had jurisdiction to make.

The ground for appealing to the judiciary is clear. Attendance of witnesses can be enforced efficiently only by contempt proceedings. These proceedings, arbitrary at best, the legislature may hesitate to commit to any mere administrative officer. Hence it may properly intrust to the courts the duty of securing such attendance.

The authorities are fully discussed in the opinions in the Brimson case.

II.

Even if the judge can not be called upon to issue a subpœna, nevertheless the clerk has no right to disregard the mandate of Congress. The clerk is not a judicial, but an executive officer, although he receives his appointment from the judge. He was appointed under Article II, § 2 of the Constitution, providing for the executive

department of the Government. (*Ex parte Hennen*, 13 Pet., 230, 258.)

The fact, therefore, that his main duties are connecte with judicial administration does not debar Congress from conferring upon him duties of an executive nature.

III.

Application for a *mandamus* is a proper remedy.

There is no discretionary element in the case, the court and clerk having both refused altogether to act in the matter.

It does not seem necessary at the present stage of the proceedings to argue whether the judge or clerk has or has not a discretion under the statute of 1882 to issue or refuse a subpœna. This question is relevant only to the form of the final order in this proceeding. If he has a discretion in the matter, he should be directed to consider and decide the application upon its merits. If he has no discretion, but is bound to issue the subpœna when requested to do so, the writ of mandamus should so direct.

The Commissioner of Pensions has no discretion. If neither the judge nor the clerk should issue a subpœna, he can not procure the testimony of the witness, and therefore can not pass upon the pension claim.

The case does not appear to be a proper one for an appeal, as the application of the Commissioner is purely *ex parte*. It would, therefore, seem to come within the numerous decisions of this court holding that a writ of *mandamus* may be used to compel an inferior tribunal to act upon a matter within its jurisdiction. As before

stated, the fact that there is a constitutional question gives jurisdiction to this court, rather than to the circuit court of appeals, in the premises.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

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